Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CLACY WATSON HERRERA

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the *sua sponte* removal of the Chief Judge of the District Court from Petitioner's then-ongoing criminal jury trial by the Seventh Circuit Court of Appeals, and that court's order directing the District Court to install a substitute judge to complete the jury trial, violated Petitioner's Due Process rights and warrants prompt review by this Court to resolve the important federal question of whether a trial judge may ever be removed from a criminal jury trial, and the trial resumed before a substitute judge, without the defendant's consent.

Whether the grant of mandamus relief reversing the exclusion of evidence by the Chief Judge, when that discretionary ruling excluding evidence occurred after Petitioner was placed in jeopardy but before final verdict, represented an abuse of the writ in that the government obtained relief specifically withheld from it by the Congress in 18 U.S.C. § 3731, through a use of mandamus specifically disapproved by this Court in the relevant decision of *Will v. United States*, 389 U.S. 90 (1967).

Whether the Court of Appeals in this case departed so far from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

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PETITION FOR A WRIT OF CERTIORARI

Clacy Watson Herrera ("Petitioner") respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 614 F.3d 661 (7th Cir. 2010), and reprinted in the appendix to this petition ("Pet. App.") at 2a-13a. Additional relevant orders entered by the Court of Appeals are reprinted at 22a-28a. The relevant decision of the District Court, as reflected in the trial transcript, is reprinted at Pet. App. 25a-28a.

JURISDICTION

The Court of Appeals entered its judgment on July 27, 2010 and denied rehearing on July 30, 2010. Pet. App. 2a-13a, 22a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district nor shall any state deprive any

person of life, liberty, or property, without due process of law.

STATUTES INVOLVED

Title 18, Section 3731 of the United States Code provides in relevant part that in a criminal case, "[a]n appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict. . . ." 18 U.S.C.A. § 3731.

Rule 25 of the Federal Rules of Criminal Procedure provides as follows: "Any judge regularly sitting in or assigned to the court may complete a jury trial if: (1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and (2) the judge completing the trial certifies familiarity with the trial record."

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner asks this Court to review two extraordinary actions taken by the Seventh Circuit Court of Appeals during Petitioner's criminal jury trial: Upon a government petition for writ of mandamus, the Court of Appeals (1) removed the trial's presiding District Court judge *sua sponte* and without exploration of Petitioner's Due Process rights against such a substitution without his consent; and (2) granted a writ of mandamus that

overruled an evidentiary ruling by the trial judge notwithstanding the federal statutory bar against the government's taking of interlocutory appeals of evidentiary rulings once the defendant is in jeopardy and before final verdict. 18 U.S.C. § 3731. In so doing, the Court of Appeals decided important questions of federal law that have not been, but should be, settled by this Court, and departed substantially from the accepted and usual course of judicial proceedings. The mandamus ruling also conflicts with a relevant decision of this Court. Accordingly, certiorari should be granted.

With respect to the summary removal of the trial judge, who is the Chief Judge of the District Court, Federal Rule of Criminal Procedure 25(a) provides a mechanism for judicial substitution in the case of the trial judge's death or disability upon the substitute judge's certification of her familiarity with the trial record. But in criminal cases, the constitutionality of Rule 25(a)'s application without the defendant's consent has not been settled by the federal courts, and at least one leading commentator has asserted that such an application of Rule 25(a), as invoked here by the Court of Appeals, is *not* constitutional. 2 Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* § 392 (4th ed. 2009). Acting in what the Court of Appeals admitted was "unavoidable haste" in the context of the request for mandamus relief in the midst of Petitioner's ongoing criminal trial, the Court of Appeals did not explore the constitutional limitations upon its summary substitution of the trial judge. The decision illustrates the need for this Court to provide guidance to the federal judiciary concerning

the circumstances in which Rule 25(a) could be applied, if ever, to supplant mid-trial the judge before whom the trial began, without the defendant's consent. In addition, the Court of Appeals issued its order removing the Chief Judge with no recusal motion from the government and no opportunity for Petitioner or the Chief Judge (who formally requested an opportunity to be heard on the mandamus petition) to address the significant constitutional or procedural issues, departing significantly from the accepted and usual course of judicial proceedings and calling for an exercise of this Court's supervisory authority.

In granting a writ of mandamus commanding the District Court to admit evidence that the Chief Judge had excluded, the Court of Appeals permitted the government to make an end run around the federal statutory prohibition against interlocutory appeals of evidence rulings made during trial. *See* 18 U.S.C. § 3731. By granting mandamus after Petitioner's petit jury was sworn and seated, the Court of Appeals gave the government relief which the Congress had specifically withheld in enacting Section 3731. The unlawful mandamus litigation had a disruptive and ruinous effect on Petitioner's jury trial, demonstrating why interlocutory appellate litigation of evidence rulings should not be permitted as a matter of sound judicial policy, and are not permitted by Section 3731 as a matter of unambiguous law. Indeed, this Court has specifically held that mandamus may not be used as a route around Section 3731, even if the government is left without an appellate remedy to a ruling that

could make securing a conviction more difficult. *See Will v. United States*, 389 U.S. 90, 96-97 & n.5.

For the foregoing reasons, Petitioner respectfully requests that this Court grant the proposed writ of certiorari.

B. BACKGROUND

Defendant was extradited from Panama on June 24, 2009, to face trial on this December 2001 criminal indictment alleging his participation in a drug-smuggling conspiracy involving the concealment of liquefied cocaine in baby formula cans, among other alleged smuggling activities.

In late October 2009, one week before the then-scheduled trial, the government disclosed for the first time that it was prepared to offer an opinion of a fingerprint examiner that Petitioner's known prints matched two latent fingerprints found on a piece of drug packaging (later referred to as Government Exhibit Roberson Seizure 2 or the "Roberson Seizure Evidence") from a packet of heroin recovered from the body cavity of a courier named Latashua Roberson. The defense opposed the untimely disclosure of this form of evidence, and the Chief Judge granted an oral motion to exclude the evidence.

The government then took an interlocutory appeal of the Chief Judge's ruling, and as the jury trial had not yet begun, this interlocutory appeal was permitted by 18 U.S.C. § 3731. On March 3, 2010, the Court of Appeals reversed and held that exclusion was too harsh a remedy for a discovery

violation, as a continuance would permit the defense time to meet the evidence. *United States v. Watson Herrera*, 366 Fed. Appx. 674, 676-77 (7th Cir. 2010), Pet. App. 14a-18a. The issues on this appeal had nothing to do with the evidentiary foundation for admissibility of the Roberson Seizure Evidence, which the government had yet to offer at a trial that had not yet begun.

Within days of the Seventh Circuit's March 3 ruling, the defense mounted a challenge to the admissibility of the fingerprint opinion testimony under *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). On May 18, 2010, the Chief Judge denied the motion, holding that *Daubert* did not preclude admission of the proposed fingerprint analysis opinion testimony.

Trial began on July 6, 2010, with the jury ultimately considering 14 counts alleging conspiracy, importation of cocaine and heroin into the United States from Panama, and exportation of cocaine and heroin from the United States to the United Kingdom. During jury selection, the jurors were told that the trial would last two or possibly three weeks.

One week after trial began, on July 13, 2010, the government obtained from the District Court a stay of the proceedings and filed the first of two mandamus petitions directed at the Chief Judge's rulings concerning the Roberson Seizure Evidence. The first mandamus petition noted that the Chief Judge had refused to admit the Roberson Seizure

Evidence on foundational grounds,[1] and the government further suggested that in so doing, the Chief Judge was deliberately subverting the Seventh Circuit's March 3, 2010, order that the fingerprint opinion testimony should not be excluded by reason of its untimely disclosure.

With the mandamus petition still pending, the parties appeared in court on July 15 so the jury could be temporarily discharged, and during a colloquy with counsel outside the jury's presence, the Chief Judge noted that not only had the government declined to call Henry Marche, a foundational witness identified through the Chief Judge's *voir dire* of a witness, but also that the Chief Judge was concerned about still more foundational issues arising from a chain-of-custody document indicating questions "which have never been explained or answered" about the weight of the drugs in the Roberson Seizure Evidence, and about "rebagging" of the drugs. Later that day, the Court of Appeals denied the mandamus petition without prejudice on the ground that the Chief Judge said he had yet to rule, Pet. App. 19a-21a, and trial resumed on July 19 with the government stating it was calling Marche to "address the concerns raised by Your Honor."

To attempt to explain the "rebagging," the government called an Immigration and Customs Enforcement agent named Krystle Intoe for a *voir dire* outside the jury's presence, but she had no firsthand knowledge of the handling of the evidence,

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[1] Importantly, the Chief Judge's rejection of the government's first attempt to admit the Roberson Seizure Evidence occurred in front of the jury.

or of whether the evidence was handled consistently with the agency's procedures. The prosecution then offered oral explanations by government counsel to explain that the increase in weight could have occurred as a result of "rebagging" because the chain-of-custody document itself indicated that as of 2010, the exhibit now weighed some 500 grams. In response to the Chief Judge's questions about how the weight increased, the prosecutor offered that "[i]t's new bags. Any time a bag is unsealed, you have to take that unsealed bag and put it in a new bag." But the Chief Judge noted that "that's not what happened here," because as the prosecutor admitted, there were no new bags in Government Exhibit Roberson Seizure 2. During this point in the discussion, the Chief Judge referred to how "packaging could have been introduced that contained the fingerprints of this guy [the defendant], introduced at the time it was rebagged, and I need to have somebody in here to testify about when it was rebagged and that that didn't occur." But moments later, after government counsel explained that the government did not have the defendant's known fingerprints until his extradition from Panama in 2009, and after defense counsel explained that the point was not that the defendant's fingerprint was planted in the bag, the Chief Judge quickly backed off the notion that the defendant's fingerprint was planted anywhere: "Well, and that was speculation on my part, and I am just trying to impress upon government counsel the need for precision here. I use that as a speculative possibility. But you [defense counsel] are absolutely right. This was rehandled -- and, frankly, there was

no concern about fingerprints at any point in time until, apparently, October of 2009."

Meanwhile, as the government told the Chief Judge that it was "trying to locate a witness in Dallas" to address the Chief Judge's concerns about rebagging and weights, one of the first signs appeared concerning the wear and tear on the jury. A prosecutor disclosed in open court that the court security officer had learned that the jury had apparently begun a "pool," or a collective betting game, "as to whether there was going to be court today."

After a brief resumption of the evidence, the government disclosed that the witness who had made the weight and rebagging notations on the chain-of-custody form was Lynette Prado, a witness who previously had testified and had been excused, and who since had left for a camping vacation in Colorado. The Chief Judge rejected out of hand a request by the government to have Prado testify over the telephone. In a further effort to persuade the Chief Judge that the 20-gram increase in the weight of the drugs in the Roberson Seizure Evidence was not significant, the prosecutor again referred to the exhibit's then-current weight of more than 500 grams (whereas the first reported weight was 330), prompting the Court to focus on whether the government had presented a witness with personal knowledge to explain the 20-gram weight increase, and the rebagging process. Importantly, the Chief Judge emphasized that the government had not presented a witness with personal knowledge of the weights or the rebagging in compliance with Federal

Rule of Evidence 602, whereupon the government said it would attempt to procure Prado the next day.

But the government reported on the morning of July 22 that Prado could not be procured from her Colorado vacation, and then offered the Roberson Seizure Evidence into evidence again, without additional foundation. The defense objected that "what the Court has described, and what the defense believes the Court has described accurately, is a substantial question and a substantial problem that bears upon the possible tampering with the exhibit, given the difference in weights, given the comment that there is re-bagging going on." The defense made no mention of any planted fingerprint -- instead, the defense noted the simple fact, as identified by the Chief Judge, that the bag had started out at 330 grams and had grown to 350 grams during a single "rebagging" in 2001 (subsequent entries increased to more than 500 grams as late as 2010) that was never explained.

The Chief Judge then ruled on the admissibility of the Roberson Seizure Evidence, and again he made no mention of the theory of a planted fingerprint; instead he acknowledged that the government need not exclude all possibilities of tampering with evidence in order to establish a sufficient chain of custody. Pet. App. 25a-28a. He went on to find that although he was crediting (over the defense's objection) the government witnesses who testified, he was concerned about the possibility of tampering with Government Exhibit Roberson Seizure 2. He noted that the government had failed to recall Prado to explain why the drug weight

increased by 20 grams, and said, "in the absence of any further evidence, I cannot say there is a reasonable probability that the evidence has not been altered when, in fact, the document shows the evidence has been altered." Pet. App. 25a-28a. The Chief Judge excluded the evidence.

The government then obtained its second stay of the trial to allow filing of a second mandamus petition to challenge the Chief Judge's exclusion of the Roberson Seizure Evidence. It was July 21, or about two weeks since the start of trial. At this second interruption in the trial, the jury began to make clear that the additional demands of the prolonged trial were pushing some jurors past the limits of their ability to serve. Notes from three indicated that at least those jurors had serious employment- and life-related issues which were now threatening their ability to serve further. One juror broke down in tears, and another told the Chief Judge:

> I mean, we've gone through on numerous delays where we've only heard testimony for maybe 20 minutes at a day's time, and now we're telling – we're being told that the trial is going to continue and it should be no problem to continue with the trial. I can't rest my, you know, livelihood on whether or not I'm going to be called on Monday or I'm going to be called on Friday, when I've got clients and I've got potential business calling me, asking me when I'm going to be available.

After the government filed its second mandamus petition on July 26, the Chief Judge filed a written request to be heard in the Court of Appeals, and stated that the government had not accurately portrayed the record upon which it was seeking mandamus. But at 4 p.m. on July 27, without hearing more from the Chief Judge and without taking any briefing from Petitioner, the Court of Appeals issued an order granting the mandamus, removing the Chief Judge from the trial, and stating that an opinion would follow. Pet. App. 22a. Petitioner filed a rehearing petition less than an hour later before the Court of Appeals closed for the day, and then a longer, amended rehearing petition the following morning. The Court of Appeals entered its opinion on July 30. Pet. App. 2a-13a. In the opinion, the Court of Appeals said it had ruled in "unavoidable haste" because the defense had filed a mistrial motion, notwithstanding the court's pending stay of the matter. Pet. App. 4a. The Court of Appeals then explained that it was granting the mandamus petition and removing the Chief Judge from the case based on his "unreasonable fury" as demonstrated by several harsh comments he made to the government prosecutors, and his mention of the possibility that Petitioner's fingerprint was planted on the Roberson Seizure Evidence. Pet. App. 12a. The Court of Appeals further explained that its removal of the Chief Judge was justified under 28 U.S.C. § 455(a). The opinion also held that Federal Rule of Criminal Procedure 25(a) included disability by reason of recusal. The Court of Appeals did not discuss the question of whether the substitution of

judge could be constitutional absent Petitioner's consent.

When trial resumed on Monday, August 2 before a substitute District Court judge who certified her familiarity with the record, 12 jurors and no alternates remained. With its first witness on the stand since the second interruption of the trial, but without offering any new foundational testimony and in apparent reliance on the mandamus ruling, the government promptly offered Government Exhibit Roberson Seizure 2 into evidence before the jury, and in the substitute judge's first ruling before the jury, the exhibit was admitted over the defense objections.

Meanwhile, the jury was even closer to running out of time to hear the case. One juror already had told the District Court in a note that she was scheduled to leave for vacation on Thursday, August 5. The next day, August 3, saw only 11 jurors arrive for court, as one juror who earlier had broken down in tears in court over her continued service reported to the court that she had been unable to secure child care for her sick child. In consultation with the court, the parties decided to agree that the District Court should release the 11 jurors for the day and order them to return on August 4, in the hope that the then-absent 12th juror would return. The defense continued to object to the time pressure the jury was facing, including as a result of the impending vacation, stating: "The other consequence of that [delaying the trial from August 3 to August 4 for the then-absent juror] is we wind up with [the soon-to-be-vacationing juror] and possibly other jurors having an external influence on their

deliberations and the time needed to deliberate about this case." The substitute District Court judge indicated that she shared the defense's concern: "[T]heir schedules and their lives and their need to get back to work or their families or whatever it might be. I mean, [the then-absent juror]'s situation is the most compelling one, but we know every one of these jurors has issues with the time. That's my concern . . . . I think there has been an indication that at some point or another, their time runs out."

Then, after the court ordered the 11 jurors on August 3 to return the following morning, August 4, so the trial could resume, a juror asked what might happen if the then-absent juror did not show up. Without halting the proceedings or soliciting input from the parties as to how to answer that question, the District Court immediately responded by stating the following:

> Without 12 jurors, we can't proceed. You know, that's the rules from the time of -- that trials began. We need 12 jurors. That's why -- otherwise I would go ahead with whoever we have got. Grand juries are different. They have what's called a quorum for a grand jury. But for a petit jury, what you are sitting on, it's got to be 12 . . . . But we are down to 12, and we have to have everybody in order to proceed.

The District Court's contemporaneous response to the juror's question would cast a cloud over the later guilty verdict on 8 of the 14 counts.

After 11 jurors were told on Tuesday, August 3 that "we have to have everybody" but knew that they would have "everybody" only through Wednesday, August 4, because one juror's vacation would begin "even already Thursday [August 5]," as the court had stated before the jury, the jury returned on Wednesday, August 4, as a jury of 12 and heard evidence, argument, and instruction. At 3:48 p.m. on August 4, the 12-person jury began deliberating. After being told by the District Court that it could set its own schedule, the jury returned its verdict at 10:30 p.m. on August 4.

REASONS FOR GRANTING THE WRIT

A. THE SEVENTH CIRCUIT'S SUMMARY REMOVAL OF THE CHIEF JUDGE VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND WARRANTS REVIEW BY THIS COURT.

The Court of Appeals considered the propriety of its *sua sponte* substitution of judge in a criminal case, and in the midst of the jury trial itself, in one paragraph of its opinion, stating only that "disability" under Rule 25(a) included recusal. Pet. App. 24a, citing *United States v. Sartori*, 730 F.2d 973, 967 (4th Cir. 1984). The Court of Appeals did not address the important federal question of whether such a substitution can be constitutional without the defendant's consent. Neither this Court nor the lower federal courts have definitively answered that question. This Court should answer it by holding that stripping a criminal defendant of his trial judge once jeopardy attaches in a jury trial

violates fundamental conceptions of Sixth Amendment due process at trial.

A criminal defendant's rights under the Due Process Clause of the Sixth Amendment stem from the fundamental right to a trial before an impartial jury. This Court has viewed Sixth Amendment due process at trial to have among its essential elements a right to have the trial in the presence and under the supervision of a judge having the power to instruct the jury as to the law "and advise them in respect to the facts . . . . [and] to set aside their verdict, if, in his opinion , it is against the law or the evidence." *Patton v. United States*, 281 U.S. 276, 288 (1930) (*rev'd on other grounds by Williams v. Florida*, 399 U.S. 78 (1970)). In the context of the Double Jeopardy Clause, this Court has spoken of the defendant's "valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 689 (1949), and of jeopardy attaching "once defendant is put to trial before the trier of the facts, whether the trier be a jury or judge." *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Although the federal courts have never definitively settled the constitutional question of whether a substitution of judge in a criminal jury trial may constitutionally occur over the defense objection, a number of courts have pointed out that the precise question of substitution without the defendant's consent was not presented. Among these decisions is *Sartori*, upon which the Court of Appeals relied for the proposition that Rule 25(a) authorized the substitution of the Chief Judge in this case. As the Fourth Circuit noted in *Sartori*, the defendant in

that case made no objection to the substitution of judge. 730 F.2d at 967 n.1; *see also United States v. Lynch*, 598 F.2d 132, 135 n.7 (D.C. Cir. 1978) ("Since all defendants were willing to accept such a substitution, we need not decide whether the Constitution permits such assignment when defendant does not consent."), citing C. Wright, *Federal Practice and Procedure* § 392 (1969).

The Wright treatise is the leading authority to address the unconstitutionality of the forced substitution of a criminal defendant's trial judge in the midst of a trial. Wright noted that this Court "commented adversely on a draft [of Rule 25] that apparently would have permitted substitution during trial, asking if it had been considered whether such a rule were constitutional and in any event whether as a matter of policy it should be permitted." 2 Wright & Henning, *supra*, § 392, citing Lester B. Orfield, *Disability of the Judge in Federal Criminal Procedure*, 6 St. Louis U.L.J. 150, 151 (1960). Wright concluded that such a substitution without consent is not constitutional in a criminal case, discussing *Freeman v. United States*, 227 F. 732, 759 (2d Cir. 1915), an older case in which the Second Circuit held that substitution of a judge may not take place in a criminal trial even with the defendant's consent. In *Freeman*, the Second Circuit considered a criminal trial to consist of "at least one judge and 12 jurors, all of whom must remain identical from the beginning to the end." 277 F. at 759.

The Wright treatise states, in 2009: "The reasoning of the Second Circuit still has vitality if

defendant does not consent. In the absence of consent, it would seem that Rule 25(a) cannot be validly applied, and that the death or disability of the judge requires that a mistrial by granted." 2 Wright & Henning, *supra*, § 392. In *Whalen v. Ford Motor Co.*, 684 F.2d 272, 274 (4th Cir. 1982), the court further cited Section 392 of the Wright treatise with approval in reversing a civil jury verdict reached after a mid-trial substitution of judge over one party's objection. The court further noted that the scenario of recusal without a defendant's consent in a criminal case under Rule 25(a) was a "possibly thorny question" not presented. *Id.* State courts also have recognized the issue. *See, e.g. Bailey v. State*, 397 N.E.2d 1024, 1027 (Ind. App. 1979) ("where the defendant does not waive his right to trial before the same judge, a mistrial must be declared if the original judge is unable to continue after the trial has begun but before the verdict is returned or the findings or decision of the court is filed"); *State v. Davis*, 564 S.W.2d 876, 878-79 (Mo. 1978) (citing Wright treatise as support for holding that Missouri courts would not adopt a rule of practice comparable to an interpretation of Rule 25(a) permitting substitution of a defendant's trial judge without consent, and citing cases of older vintage); *People v. McPherson*, 74 Hun. 336, 26 N.Y. Supp. 236 (1893) ("The proposition that a criminal case cannot be partly tried before one magistrate and partly before another seems to me too clear to need argument or citation of authority to sustain it. When the trial of a case is once commenced, it must proceed to the end before the same court and jury").

Even cases holding that the mid-trial substitution of a judge is permissible acknowledge that the issue is one of constitutional dimension. *See, e.g., Commonwealth v. Carter*, 669 N.E.2d 203, 205 (Mass. 1996); *United States v. LaSorsa*, 480 F.2d 522, 530 (2nd Cir. 1973). In *Carter*, the Massachusetts Supreme Court held that a mid-trial substitution of the hospitalized trial judge did not violate the defendant's right to a trial by jury where the new judge complied with the requirements of Massachusetts' analog to Federal Rule of Criminal Procedure 25. 669 N.E.2d at 205 n.1, 208. Although *Carter* reasoned that prior cases disapproving of substituting a judge mid-trial were "generally entangled with outdated conceptions of the right to trial by jury," *id.* at 206, *Carter* also acknowledged that "when the judge is the finder of fact, as in . . . . prerequisites to admissibility (*e.g.*, authentication of exhibits . . . .) the judge is cast directly in the role of deciding credibility issues," and expressly declined to decide "whether a substitute judge may act as factfinder after hearing only a portion of the relevant testimony firsthand." *Id.* at 206 n.5.

In *LaSorsa*, the Second Circuit held that the defendant's right to a jury trial was not infringed where the substitute judge began presiding over the trial after the jury had already begun deliberations, the judge simply read back portions of the transcript at the jury's request and took the jury's verdict, and the defendant did not object to the substitution. 480 F.2d 522, 530-31. *LaSorsa* held that absent a showing of substantial prejudice due to the substitution, a mid-trial substitution of judge is not unconstitutional *per se*. *Id.* at 531. Similar to the

Carter court, the Second Circuit rejected the defendant's reliance on its earlier decision in *Freeman*, as based on a subsequently repudiated principle that the defendant could not waive his right to a jury trial. *LaSorsa*, 480 F.2d at 531. Here, an ample basis exists to consider whether the substitution of judge prejudiced the Petitioner, on multiple levels.

First, the jury saw the Chief Judge rule against the government on a piece of evidence that it was able to admit into evidence immediately upon entry of the substitute judge into the case. The substitution also followed remarks the Chief Judge made to the government, some in the jury's presence, suggesting adversity between the Chief Judge and the government. This creates a very substantial risk that the jury believed that the government was correct, and that the judge was being punished for siding with the defense. This message is a very bad one to send in a jury trial.

Second, the substitution deprived Petitioner, during litigation of Rule 29 (denied) directed verdict and Rule 33 (not yet decided) new trial motions, of the judge who had actually heard the government's evidence, much of which consisted of cooperating witnesses whose testimony the jury was instructed to consider with caution and great care. This case differs significantly from *LaSorsa*, in which the substitution took place after deliberations began. In *United States v. Cameron*, 953 F.2d 240, 245 (6th Cir. 1992), the court noted the difference, for purposes of evaluating impact of a substitution of judge in a criminal case after the start of trial,

between a substitution after only one day of trial and one occurring after the conclusion of a four-day government case-in-chief. This case also underscores the concern mentioned by *Carter* about the harm to the defendant when the substitute judge is called upon to find facts. This Court should review the decision below and provide guidance to the lower federal courts in the form of an answer to the question addressed by Professor Wright: Whether a trial judge may ever be recused without the defendant's consent without necessitating a mistrial.

The removal of the Chief Judge also departed from the accepted and usual course of judicial proceedings. By imposing its recusal of the Chief Judge *sua sponte*, and without the opportunity for briefing (other than the Petitioner's hurriedly filed rehearing petition immediately after the order recusing the Chief Judge), the Court of Appeals relied almost entirely on one litigant's characterization of the judge's conduct, even as the Chief Judge asked for an opportunity to explain his view that the government had mischaracterized the record. The Court of Appeals declined to offer him that opportunity, apparently as a result of the haste associated with the jury having been on the second of two hiatuses. But, for the reasons above, the summary recusal of the trial judge in the midst of a criminal jury trial was not an issue to be resolved in haste and without proper briefing. Although various interpretations of Federal Rule of Appellate Procedure 21 called for the defense and/or the trial judge in a mandamus proceeding to be heard, the Court of Appeals disposed of that requirement by citing Federal Rule of Appellate Procedure 2, a broad

general provision allowing an appeals court to suspend the appellate rules for "good cause." Pet. App. 6a.

The Court of Appeals summarily concluded that "good cause there was," *id.*, but its unsatisfactory rationales for the removal of the Chief Judge suggest that appropriate briefing would have led to a more careful judicial consideration of whether to remove the Chief Judge. In the brief order the Court of Appeals entered on July 27, Pet. App. 22a, the Court of Appeals cited its own Rule 36 as authority. But after Petitioner challenged Rule 36's applicability in his rehearing petition, the Court of Appeals made no mention of it. Instead, the court invoked 28 U.S.C. § 455(a) to conclude that recusal was justified amid "a significant risk that the judge will resolve the case on a basis other than the merits," citing the Chief Judge's purported "unreasonable fury" toward the prosecutors. Pet. App. 12a. But Section 455(a) provides a mechanism in which a judge whose impartiality may reasonably be questioned "shall disqualify himself." 28 U.S.C. § 455(a). Commonly the judge's decision of whether to disqualify himself comes after one of the parties, or the court itself, makes a motion for recusal under Section 455(a). For example, in a case relied upon by the Court of Appeals, *In re United States*, 572 F.3d 301, 308 (7th Cir. 2009), the court stated that when the appellate court receives the mandamus petition well after the District Court has denied a motion to reconsider his recusal under Section 455(a), the procedure "gives the district court adequate time to reflect on its order and, if necessary, correct its own error before another court becomes involved."

Here, there was no such motion, and no opportunity for the District Court or any of the litigants to consider recusal in the first instance. Moreover, in the very same *In re United States* decision relied on by the Court of Appeals as authority for the recusal under Section 455(a), *see* Pet. App. 12a, the court referred to a proposition "well-established in this circuit," i.e., "*that a motion for recusal under section 455(a) must be made before trial . . . .*" *In re United States*, 572 F.3d at 309 (emphasis added). The application of Section 455(a) in Petitioner's matter thus conflicted with the court's own recent precedent. In addition, the Court of Appeals issued a supplemental order on July 28 instructing the District Court on remand to proceed under Rule 25(a) of the Federal Rules of Criminal Procedure, *see* Pet. App. 24a, but neither the order nor the July 30 opinion discussed or considered Professor Wright's position that the rule cannot be applied constitutionally without a defendant's consent.

Moreover, the Court of Appeals (and the government) cast the Chief Judge's comments in the worst possible light, whereas "judicial remarks during the course of a trial that are critical or disapproving or, or even hostile, to counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994). While the Chief Judge made undisputably harsh comments to the government during the trial, those comments, notably, did not prompt the government to file any

motion for his recusal on grounds of bias or partiality.

More importantly, the Chief Judge's ruling on the Roberson Seizure Evidence was carefully considered and followed an extensive effort by the government, aided by the Chief Judge's suggestions and even his own *voir dire* examinations of witnesses, to repair the holes in the exhibit's chain of custody. It was the Chief Judge who identified Marche as the witness who could testify concerning the practices of the deceased DEA chemist who had handled the evidence. It was in response to the Chief Judge's questions that the government admitted that it had not presented a witness with personal knowledge of the weight and rebagging issues and thus would need to recall (with the Court's assent but over the Petitioner's objection) witness Lynette Prado. Indeed, the Chief Judge could have exercised his discretion to exclude the fingerprint opinion testimony under *Daubert* in May but declined to do so. The actual record was far more nuanced than the mandamus petition made plain. Thus, the Court of Appeals should have given the Chief Judge and the Petitioner a more substantial opportunity to place the judge's comments -- and his rulings -- in their proper context.

In sum, the *sua sponte* removal of the Chief Judge from the Petitioner's ongoing criminal jury trial without his consent presents this Court with an opportunity to settle the important federal question of whether such an action could ever be constitutional. The Court of Appeals' action also was outside the accepted and usual course of judicial

proceedings, and this Court should exercise its supervisory authority to hold that the Court of Appeals should not have taken such drastic action without a searching analysis of the record, the law, and the submission of all parties -- not just the government's mandamus petition.

B. THE SEVENTH CIRCUIT'S GRANT OF MANDAMUS TO REVIEW A TRIAL COURT'S EVIDENTIARY RULING AFTER THE START OF TRIAL VIOLATED THE CRIMINAL APPEALS ACT AND REPRESENTED AN ABUSE OF THE WRIT.

The Court of Appeals should not have entertained the government's two mandamus petitions. It erred by granting the second and compelling the District Court to admit evidence that the Chief Judge had excluded in a ruling made after Petitioner was placed in jeopardy and before final verdict. Congress specifically excluded such rulings from the scope of permissible government interlocutory appeals under the Criminal Appeals Act, 18 U.S.C. § 3731. The Court of Appeals thus permitted the writ of mandamus to be used as a means of circumventing Section 3731's bar against such appeals.

The conclusion by the Court of Appeals that mandamus relief was warranted because the government could not obtain appellate relief if the Petitioner were acquitted is in direct in conflict with this Court's most relevant decision on the subject. *In Will*, this Court held that the government's inability to appeal the trial court's ruling sought to be

reversed on mandamus review, even if that ruling resulted in dismissal of the government's criminal case, is "irrelevant" because "Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases that it [the government] would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions." 389 U.S. at 96-97 & n.5 Thus the Seventh Circuit's having rested mandamus on the unavailability of "other mechanisms of review," or upon the idea that mandamus is "typically directed at nonappealable orders," Pet. App. 7a, conflicts with this Court's holding in *Will* that criminal cases are fundamentally different when it comes to mandamus. *Will*, 389 U.S. at 96-98.

This Court has specifically stated that it "cannot and will not grant the Government a right of review which Congress has chosen to withhold," and that [m]andamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies [disfavoring piecemeal appeals in criminal cases]." *Id.* at 96-97 & n.5. The Court of Appeals opinion failed to account for the distinct treatment required of mandamus petitions in criminal cases and inexplicably did not cite or discuss the decision in *Will* at all. The grant of mandamus in this matter simply cannot be squared with *Will*.

In the Chief Judge's discretionary evidentiary ruling, the Chief Judge carefully weighed the evidence presented by the government on the foundational questions surrounding admissibility of the Roberson Seizure Evidence, and he credited each

of the witnesses presented by the government. The government's problem was simply that it provided no adequate witness to explain how the drugs in the exhibit grew in weight during any "rebagging" process. Pet. App. 25a-28a. In reality, the government presented witnesses who either did not testify about the "rebagging" (Marche) or whose testimony on the "rebagging" was without personal knowledge (Intoe, who did not even testify before the jury).

The Chief Judge did not base his ruling on his earlier "speculative" comment about the planting of a fingerprint. The Seventh Circuit's focus on that comment therefore was error. The Court of Appeals also erred by focusing on the explanation offered through oral statements by the prosecutor (about the exhibit increasing in weight to some 500 grams over time because of the adding of more bags, notwithstanding that substantial new bags were *not* added). Indeed, the state of the record left the Chief Judge with an ample basis to rule reasonably and soundly that the evidence should not be admitted.

A ruling by the District Court is not mandamusable simply because an appeals court might disagree with the ruling. This Court in *Will* was clear in stating that a nonappealable order does not become mandamusable simply because a reviewing court believes the order was erroneous. To suggest otherwise, this Court has said, would be to suggest that entering an erroneous order is somehow beyond a court's ordinary "power," and that would be a "semantic fallacy." 389 U.S. at 99 n.6. "Courts faced with peremptory writs must be careful lest

they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Id.*

The Court of Appeals erroneously described the Chief Judge's ruling as "so patently unsound as to exceed the legitimate bounds of judicial power," justifying mandamus. Pet. App. 5a. In fact, as noted above, the Chief Judge's ruling had a solid basis in the record: The government did not produce a witness with personal knowledge of how the drugs grew in weight. The judge's comments did not suggest that the judge was so antagonistic as to have exceeded his legitimate power in excluding the evidence. In fact, the Chief Judge actively aided the government in steering the government toward a foundational record he might find satisfactory, and the judge rejected Petitioner's challenge to the fingerprint evidence under *Daubert*. Again, the manner in which the Seventh Circuit decided the mandamus petitions without hearing sufficiently from the Petitioner or the Chief Judge contributed to the one-sided prism through which the Seventh Circuit viewed the record here. The "unavoidable haste" in which the Seventh Circuit said it acted was avoidable -- it could have dismissed the petitions out of hand. Under the law, it should have.

By entertaining the petitions, the Seventh Circuit opened the door to the many problems that Congress designed Section 3731 to avoid in criminal trials. Predictably, those problems arose here. When Petitioner and his counsel should have been continuing to prepare for the ongoing trial, they were

preparing to litigate mandamus proceedings in the Court of Appeals. The mandamus petitions imposed added delays and costs associated with appellate litigation in the middle of a trial at which Petitioner rightfully expected a speedy resolution to the charges against him. Ultimately, the government's repeated mid-trial trips to the Court of Appeals placed an immense strain on the jurors, who saw the trial delayed -- and who were sent home -- twice, so that the trial was extended well past the jurors' reasonable expectations. In *Lynch*, the District of Columbia Circuit expressed concern about interruption of the jury's focus during a two-week lapse in the trial, and about the extension of the trial past the time when the jurors expected it to end. 598 F.2d at 135. The latter concern, the court said, "raised the additional problem that the jury might be subject to pressure resulting from a desire to decide the case expeditiously." *Id.*

Importantly here, the two stays of the trial, and the delays associated with them, appear to have run out the jury's clock, in that an incident at the end of the trial rendered the resulting verdict constitutionally invalid On August 3, the jurors were told that all 12 needed to be present to proceed, at a time when there is reason to believe that the jurors knew that very shortly, on August 5 (the day after the verdict was returned at 10:30 p.m.), their number would dwindle to 11 because of a juror's planned vacation. Petitioner thus was deprived of a fair trial by operation and consequence of the mandamus petitions.

Accordingly, the manner in which the Court of Appeals entertained and eventually granted mandamus presents not only an important federal law question that this Court should settle under the precepts of *Will*, but also represents a departure from the accepted and usual course of judicial proceedings warranting an exercise of this Court's supervisory authority. As this Court stated in *Will*, issuing a writ of mandamus in a criminal case has "wide implications" for the orderly administration of justice in the federal courts, 389 U.S. at 95, and this particular writ issued in derogation of Section 3731 presents a question clearly warranting review on certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted so that this Court may consider whether to set aside the jury's verdict and order a new trial.

October 28, 2010

Respectfully submitted,

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Appendix A

United States Court of Appeals,
Seventh Circuit.

In re United States of America.
Case No. 10-2766

Submitted July 26, 2010.
Decided July 27, 2010.
Opinion July 30, 2010.

Before POSNER, ROVNER, and SYKES, Circuit Judges.

POSNER, Circuit Judge.

On July 27, in response to the government's renewed petition for a writ of mandamus, we issued an order granting the petition and directing the district court to admit into evidence in *United States v. Herrera*, the criminal trial of Clacy Watson Herrera on drug charges, an exhibit labeled "Roberson Seizure 2"; to allow the government to recall Stephen Koop to testify at trial about the recovery of latent fingerprints from that exhibit; and to allow testimony regarding comparison of the latent prints with known fingerprints of the defendant. The judge had excluded the exhibit and related testimony because he suspected the government, on the most tenuous of grounds, of having tampered with the evidence, and he threatened to grant a mistrial that would bar any further prosecution of the defendant by virtue of the constitutional prohibition against placing a person in double jeopardy.

Our order further stated: "The case shall be reassigned to a district judge who is immediately available to preside, and the trial shall resume as soon as possible." (The trial had begun on July 6 and had been interrupted for several days because of the judge's rulings that gave rise to two petitions for mandamus filed by the government.) We were troubled to learn that a replacement judge was not designated until the afternoon of July 29, owing to an unaccountable delay in appointing an acting chief judge to substitute for Chief Judge Holderman (the district judge presiding in this case whom we ordered recused) in arranging for the reassignment.

In a supplemental order issued on the 28th, we noted that Fed. R. Crim. P. 25(a) provides that in a case in which "death, sickness, or other disability" prevents the trial judge from continuing to preside at a trial, the judge who replaces him must certify his familiarity with the trial record before proceeding. "The term `other disability' in Rule 25(a) includes disability by reason of recusal." *United States v. Sartori*, 730 F.2d 973, 967 (4th Cir. 1984). And so our supplemental order directed the new judge, before proceeding with the trial, to certify his or her familiarity with the record.

We said in our order of the 27th that we would issue an opinion explaining it. This is that opinion; in it we also deny the defendant's petition to rehear our order.

The petition for mandamus had been filed just one day before we issued our order (which is why we

were unable, for lack of time, to issue a statement of reasons). We ruled in unavoidable haste because in apparent response to the government's petition the defendant had moved the district judge to declare a mistrial—and the judge had already stated in open court that if he granted a mistrial it would have double-jeopardy effect on the entire case even though, he said, the exhibit "relates to one count, Count No. 35, the very last count.... What will remain are 14 counts...of which multiple witnesses have testified about the defendant's involvement. And if we grant a mistrial, if a mistrial is granted, every one of those counts potentially could be dismissed from the standpoint that double jeopardy will attach to each and every one of those additional counts." And he invited the jurors to provoke a mistrial by telling them: "I certainly would understand if you are not available, you have served your term, and more than your term, as jurors"—a remark that precipitated notes from several jurors expressing concern about continuing to serve.

The judge had accused the government of lying and other misconduct and of not wanting the jury to decide the case. The second accusation is difficult to understand. Double jeopardy would bar a retrial if the government had procured the mistrial because of its dissatisfaction with the jury, even if the motion for a mistrial was made by the defendant, as it was. *Oregon v. Kennedy*, 456 U.S. 667, 673-76 (1982) (goading the defendant into moving for a mistrial); *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (same); *United States v. Warren*, 593 F.3d 540, 545 (7th Cir. 2010) (same). Yet he told the prosecutors: "I find the government's conduct in seeking to preclude

this jury from making a determination with regard to the other counts, if I determine that Government Exhibit Roberson Seizure 2 is not admissible, I find that to be an intentional, purposeful statement that you don't want a determination by the jury in this case.... [W]hat the government wants is to have this jury not decide this case."

To prevent double jeopardy because of a trial judge's ruling that is so patently unsound as to exceed the legitimate bounds of judicial power is a legitimate role for mandamus when other mechanisms of review are unavailable, *United States v. Vinyard*, 539 F.3d 589 (7th Cir. 2008); *United States v. Amante*, 418 F.3d 220, 222 (2d Cir. 2005); *United States v. Wexler*, 31 F.3d 117, 128 (3d Cir. 1994); *United States v. United States District Court*, 858 F.2d 534, 537 (9th Cir. 1988); see generally *In re Rhone-Poulenc Rorer, Inc.*,, 51 F.3d 1293, 1295 (7th Cir. 1995). We regret to say that the judge's ruling in this case can only be characterized thus. We note that this judge was mandamused in *In re United States*, 398 F.3d 615 (7th Cir. 2005) (per curiam), when he became wrathful toward federal prosecutors in another criminal case.

The defendant responded to our order of the 27th seemingly within minutes by filing a petition for rehearing (we accepted his amended petition for filing the next day). In it he argued that our ordering mandamus was improper because we had given neither him nor the judge a chance to respond to the petition, as required (he claims) by Fed. R. App. P. 21(b). Confusingly, this subsection of the rule refers to a response by the "respondent," and the

respondent in a petition to mandamus is the judge. But Rule 21(a)(1) and the Committee Notes to the 1996 Amendments to Rule 21 make clear that "respondent" in (b)(1) refers just to parties, not to the judge. Indeed the judge may not respond to the petition unless invited or ordered to by the court of appeals, Fed. R. App. P. 21(b)(4), and not wanting to delay the resumption of the trial we had not ordered or invited him to reply.

And because there was no time for us to order and await a response from either the defendant or the judge before granting the petition, the absence of such an order did not preclude our granting the petition for mandamus. Rule 2 of the appellate rules authorizes a court of appeals on its own initiative to suspend any of those rules that are not jurisdictional if necessary "to expedite its decision or for other good cause." See *Alva v. Teen Help*, 469 F.3d 946, 956 n. 17 (10th Cir. 2006); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999). Good cause there was. But now, in deciding to deny the defendant's motion to rehear our order, we have treated the defendant's motions, the judge's request to file a response (which we had not received before we granted the petition for mandamus), along with the transcript of the district judge's pertinent remarks in court, as responses, pursuant to Fed. R. App. P. 21(b), to the petition for mandamus.

The defendant points out that 18 U.S.C. § 3731, which governs appeals by the United States in criminal cases, does not authorize an appeal from an order excluding evidence if the order was issued after the jury is sworn. *Crist v. Bretz*, 437 U.S. 28, 35

(1978); *United States v. Salahuddin*, 509 F.3d 858, 862-63 and n. 9 (7th Cir. 2007); *United States v. Centracchio*, 236 F.3d 812, 813-14 (7th Cir. 2001); *United States v. Brooks*, 145 F.3d 446, 453 n. 2 (1st Cir. 1998). But the government has not appealed from the order; it has sought mandamus, which is typically directed against nonappealable orders, as otherwise an appeal would do. "There is no need to issue a writ of *mandamus* if the normal procedures for error correction would suffice." *United States v. Vinyard, supra*, 539 F.3d at 591. They would not in this case; were the defendant to be acquitted because of the exclusion of the fingerprint evidence, double jeopardy would bar any further prosecution of him. The judge said that the evidence related to only one count of the indictment, but that is wrong. *United States v. Herrera*, 366 Fed. App'x 674, 676-77 (7th Cir. 2010). The evidence is key in linking the defendant to the conspiracy charged in the other counts, and is made especially important by the long delay (attributable to difficulty in locating the defendant and bringing him back to the United States for trial) between the crimes with which he is charged, which occurred between 1996 and 1999, and the trial in 2010. The fingerprint evidence, unlike the memories of witnesses, had not deteriorated with the passage of time.

The trial, as we said, began on July 6. Before then, in March, on the government's appeal from an order excluding evidence before trial we had reversed the district judge's decision to exclude evidence that two of the defendant's fingerprints had been recovered from a bag of heroin wrapped in tape and further encased in condoms and found in a drug courier's

rectum. *United States v. Herrera, supra.* The heroin had been removed from the bag and placed in an evidence bag (Roberson Seizure 1) and then both it and the packaging (the tape and condoms) had been placed in another evidence bag (Roberson Seizure 2), and it was this second exhibit that was at issue. The district judge's ground for excluding it was the government's having violated a discovery deadline, and we ruled that there was no indication of bad faith by the government and that the exclusion of highly probative fingerprint evidence was a disproportionate sanction for an innocent violation that had not prejudiced the defendant.

A week into trial the district judge again ordered the evidence excluded, this time because of his concern that the government hadn't adequately demonstrated the requisite "chain of custody"—that there had been no opportunity to tamper or otherwise mishandle the evidence between when it was obtained and the trial. Yet a challenge to chain of custody ordinarily goes to the weight rather than the admissibility of the evidence. E.g., *United States v. Turner*,, 591 F.3d 928, 934-35 (7th Cir. 2010); *United States v. Lee*, 502 F.3d 691, 697-98 (7th Cir. 2007). And already by the end of the first week of trial the government had offered nine witnesses—and it added a tenth before filing its second mandamus petition—to establish that the chain had been intact and thus assuage the judge's concerns.

The judge stayed the trial to enable the government to petition for mandamus. We granted a brief further stay while we considered the petition, but upon being unexpectedly advised by the judge that he hadn't yet made a final decision on whether to exclude the evidence (though when he sustained the defendant's

objection to the evidence he had given no indication that his ruling was tentative), we denied the petition without prejudice.

Trial resumed on July 19, and three days later the judge definitively excluded the fingerprint evidence on suspicion of tampering. He was disturbed by the fact that the exhibit had gained 20 grams in weight between May and September 2001. (Oddly, he attached no significance to the fact that it had gained 190 grams between September 2001 and the trial.) He thought the weight gain might have been due to federal officers pressing a piece of adhesive tape containing the defendant's fingerprints (obtained elsewhere) onto the packaging of the heroin found in the drug courier's rectum. Again he stayed the trial to enable the government to renew its quest for mandamus, and it is the government's renewed petition that we granted on July 27.

The transcript of the district judge's remarks concerning the evidentiary issue reveals a degree of anger and hostility toward the government that is in excess of any provocation that we can find in the record. He repeatedly accused the government lawyers of lying. He said, for example: "I don't believe you when you say just about anything anymore because I know that you will lie to a court any time it helps you. I know that. I saw you do it. I know you will do that. You have proven that to me beyond a reasonable doubt." He said: "I am going to bring the jury out, and I am going to tell them the government has failed, once again, to have witnesses ready to proceed. The government is delaying this case. Members of the jury, this case is being delayed

by the government. It has been delayed by the government. Your time has been wasted by the government." He said: "I would like you [the government lawyers] to go back to the Court of Appeals and tell them, gee, we would like to mandamus Judge Holderman because he won't allow us to call more witnesses or prove our chain of custody that we asked you, the Court of Appeals, last week to order him to present in the evidence in the case, to admit the document, to admit the exhibit into evidence. We now want to call more witnesses to lay the foundation, witnesses that Judge Holderman has pointed out we need. We now agree with Judge Holderman, and we were wrong last week when we tried to mandamus him. I would like you to go to the Court of Appeals and you tell them that. Will you do that?... Will you do that? Will you go to the Court of Appeals and admit that you lied to them...." He threatened to conduct hearings concerning misconduct by the prosecutors (shades of the conduct that led to the issuance of the writ of mandamus in *In re United States, supra*).

The government had explained to the judge that the reason for the increase in weight was that the bag with the fingerprints, after being opened so that the presence and amount of an illegal drug could be determined, and later closed up again, had been weighed together with other bags. The reported weight was the weight of the package containing the several bags, and there were more bags in it when it was weighed later. Obviously the package did not gain 210 grams (330 + 20 + 190 = 540)—almost half a pound—because a piece of the tape in which one of the bags was wrapped was replaced by a strip of tape

containing the defendant's fingerprints. The judge acknowledged that his supposition of tampering was "speculative," which is an understatement. For among other things the defendant was not extradited from Panama until long after the alleged tampering, and until he was extradited the government did not have a set of fingerprints known to be his; and in addition no one has explained how fingerprints on another piece of material could have been transferred to the adhesive side of the tape, which was where they were found.

Any such tampering would be a criminal obstruction of justice. A judge should not accuse anyone of a crime on the basis of an implausible speculation. We note that the defendant's petition and amended petition for rehearing do not defend the judge's theory.

The defendant will be able at trial to argue that the jury should disregard the evidence, but there is no justification for excluding it on the "speculative" ground excogitated by the judge. *United States v. Prieto,* 549 F.3d 513, 524-25 (7th Cir. 2008); *United States v. Kelly,* 14 F.3d 1169, 1175 (7th Cir. 1994); *United States v. Harrington,* 923 F.2d 1371, 1374 (9th Cir. 1991) ("merely raising the possibility of tampering is not sufficient to render evidence inadmissible"). So clear is this, and so manifest the excess of emotion demonstrated by the judge in excluding the evidence, that we can only conclude that the exacting standard for the grant of a writ of mandamus, *Cheney v. United States District Court,* 542 U.S. 367, 380 (2004); *In re Rhone-Poulenc Rorer, Inc., supra,* 51 F.3d at 1294-95 (7th Cir. 1995)

("irreparable injury is not sufficient for mandamus; there must also be an abuse of discretion that can fairly be characterized as gross, very clear, or unusually serious"); *United States v. Spilotro,* 884 F.2d 1003, 1006-07 (7th Cir. 1989), has been satisfied.

A word finally about our decision to order the case reassigned to another judge. As explained in *In re United States,* 572 F.3d 301, 308 (7th Cir. 2009) (a different case from the *In re United States* cited earlier), the recusal of a judge is required "when a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." See 28 U.S.C. § 455(a); *Reserve Mining Co. v. Lord,* 529 F.2d 181, 188-89 (8th Cir. 1976) (en banc). When the government filed its initial interlocutory appeal, the district judge without adequate grounds accused the government of appealing for the sole purpose of delaying the trial, and implied, again without basis in the record, that the government had acted in bad faith by not complying with the judge's discovery order. After the trial began, he told the jury that the government was responsible for the numerous delays in the case and he threatened to tell the jury that it "should consider the case based upon everything that has happened in the courtroom, presented in the court-room, including the delays that have taken place." No reasonable person would fail to perceive a significant risk that the judge's rulings in the case might be influenced by his unreasonable fury toward the prosecutors.

We are satisfied that our order of July 27, as supplemented on July 28, was sound; and we deny the petition for rehearing.

Appendix B

United States Court of Appeals,
Seventh Circuit

UNITED STATES of America, Plaintiff-Appellant,
v.
Clacy Watson HERRERA, Defendant-Appellee.
No. 09-3717.

Argued Feb. 25, 2010.
Decided March 3, 2010.

Tyler Murray, Attorney, Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellant.

Gabriel A. Fuentes, Attorney, Jenner & Block LLP, Chicago, IL, for Defendant-Appellee.

Before RICHARD D. CUDAHY, Circuit Judge, TERENCE T. EVANS, Circuit Judge, DIANE S. SYKES, Circuit Judge.

ORDER

One week before Clacy Watson Herrera's trial was scheduled to begin, the government announced that it intended to introduce fingerprint evidence. The district court, finding the disclosure to be a violation of its discovery deadline, entered an order excluding the evidence. The government brings this interlocutory appeal, under 18 U.S.C. § 3731, challenging the decision to exclude its fingerprint evidence.

Herrera was charged in 2001 as the lead defendant in a 44-count indictment that alleges a three-year international drug trafficking conspiracy involving over 40 individuals. From 1996 to 1999, the conspirators, allegedly, imported large amounts of cocaine and heroin into the United States from Jamaica and Panama. Herrera, operating in Panama, was alleged to be the conspiracy's primary supplier. The conspirators recruited female couriers in the United States, primarily in Chicago, to travel to Panama to receive drugs from Herrera. Various methods were used to smuggle the drugs into the United States. On some occasions, the organizers put the drugs in plastic wrap packaging, which the couriers swallowed or inserted into their body cavities. The most popular method, however, involved hiding the drugs inside baby formula cans. To avoid questions at airport security, the conspirators paid parents in the United States to loan their infants to the smugglers. The couriers traveled with the rented infants and baby formula cans to Panama where the cans were filled with liquid cocaine for the return trip.

Not only is this case complex given the size of the operation, but it is also unusual. The indictment named 26 defendants, 22 of whom were convicted in 2002 and one was convicted in 2004. Meanwhile, Herrera remained a fugitive from 2001 until June 2009 when he was extradited from Panama, where he had been in custody on an unrelated narcotics conviction.[FN1] Herrera was arraigned in federal court in Chicago on June 25, 2009. At a status hearing a few weeks later, on July 16, a November 9, 2009, trial date was set.

> FN1. Apparently Herrera either escaped or was released from custody in Panama sometime in 2007. Subsequently, the government says, he was located in Colombia and returned to Panama.

Due to the passage of time between the indictment and trial, witnesses have been hard to come by, let alone ones who remember events that occurred over a decade ago. Accordingly, on August 14, 2009, the district court certified this matter as a complex case under the Speedy Trial Act and entered an order requiring disclosure of expert testimony by September 21.

In early September, federal agents began gathering evidence from the old investigation (such as drugs and drug packaging) that they believed was connected to Herrera. The government advised him that it was submitting the evidence for fingerprint analysis. Then on September 21, the government notified Herrera that it might call a fingerprint expert, but, at that time, it had not received any results from the fingerprint testing. On November 2, a week before trial, the government was informed that two fingerprints matching Herrera's had been found on drug packaging. The government disclosed the results to Herrera along with a preliminary expert report. On November 3, Herrera asked the district court to exclude the fingerprint evidence due to the government's tardiness. The court granted the motion.

As an initial matter, the government argues that it

did not violate the district court's discovery order because the September 21 deadline did not apply to fingerprint testing. We review a district court's discovery rulings for an abuse of discretion. United States v. Stevens, 380 F.3d 1021, 1025 (7th Cir.2004). The government notes that, at a hearing on September 29, Herrera acknowledged the government's ongoing fingerprint testing and said he may need to obtain his own expert opinion. Therefore, the government argues there was no understanding that the September 21 deadline applied to fingerprint evidence. However, the government fails to cite any case law to support its claim. The district court is entitled to great deference in construing its discovery order, and thus it was not an abuse of discretion to find the government in violation of it.

[2] The district court went too far, however, in its choice of remedy. The punishment simply does not fit the crime. We review a district court's ruling on the admission or exclusion of evidence for an abuse of discretion. *United States v. Jumper*, 497 F.3d 699, 703 (7th Cir.2007). When considering a motion to exclude evidence, a district court should take into account whether the government acted in bad faith and whether any unfair prejudice to the defendant can be cured by a less severe alternative. See *United States v. De La Rosa*, 196 F.3d 712, 717 (7th Cir.1999). There is no showing here of either bad faith or reckless foot-dragging by the government. Because the evidence is scientific, it has immense probative value. This is a complex case where a great deal of time has passed, so witnesses' memories may be poor, making the scientific evidence all the more

crucial. Exclusion of the government's fingerprint evidence was too drastic a remedy. A more appropriate remedy might have been moving the trial ahead a few weeks to give the defense a greater opportunity to study and confront the evidence. Of course, that would have worked an imposition on the court's calendar, but such is life. We think the district court's order was an abuse of discretion.

We REVERSE and REMAND for further proceedings.

C.A.7 (Ill.),2010.
U.S. v. Herrera
366 Fed. Appx. 674, 2010 WL 730150 (C.A.7 (Ill.), 2010)

Appendix C

United States Court of Appeals,
Seventh Circuit

In Re United States.
Case No. 10-2678.

July 15, 2010

Before POSNER, ROVNER, and SYKES, Circuit Judges.

The following are before the court:

1. GOVERNMENT'S PETITION FOR A WRIT OF MANDAMUS, filed on July 14, 2010, by counsel for the petitioner.

2. REQUEST BY RESPONDENT, JAMES F. HOLDERMAN, FOR AN OPPORTUNITY TO RESPOND TO THE GOVERNMENT'S PETITION, filed on July 15, 2010, by the respondent.

On July 14, 2010, the court granted the GOVERNMENT'S EMERGENCY PETITION FOR STAY OF TRIAL PROCEEDINGS, filed on July 14, 2010, by counsel for the government and ordered the district court to stay trial pending resolution of #1.

The government's petition seeks the remedy of mandamus against evidentiary rulings made by the

respondent excluding certain physical evidence that was the subject of an earlier appeal in this case, *see United States v. Herrera*, No. 09-3717 (7th Cir. Mar. 3, 2010), and related rulings excluding expert-witness testimony regarding that physical evidence. The exclusion of this evidence appears to be premised on chain-of-custody grounds. *But see United States v. Lee*, 502 F.3d 691, 697 (7th Cir. 2007) (government is "not required to prove a perfect chain of custody," and any gaps in the chain go to the weight of the evidence and not its admissibility); *United States v. Kelly*, 14 F.3d 1169, 1175 (7th Cir. 1994) ("When there is no evidence of tampering, a presumption of regularity attends the official acts of public officials in custody of evidence."); *id.* (The government need not exclude all possibilities of tampering; "all the government must show is that reasonable precautions were taken to preserve the original condition of evidence.").

Respondent avers in #2 that he "has made no definitive ruling on the record admitting or excluding [the] evidence at issue." The court construes this as a statement that the respondent also has not definitively ruled on whether the government may recall Stephen Koop, its expert forensic chemist. In light of respondent's averment, IT IS ORDERED that the stay is VACATED.

IT IS FURTHER ORDERED that #1 is DENIED without prejudice to renewal after definitive rulings are made.

IT IS FINALLY ORDERED that #2 is DENIED as moot.

Appendix D

United States Court of Appeals,
Seventh Circuit

In Re United States.
Case No. 10-2678.

July 27, 2010

Before POSNER, ROVNER, and SYKES, Circuit Judges.

IT IS ORDERED that the GOVERNMENT'S RENEWED PETITION FOR A WRIT OF MANDAMUS, filed on July 26, 2010, by counsel for the petitioner is GRANTED.

The district court shall admit G. Ex. Roberson Seizure 2, allow the government to recall Stephen Koop to testify regarding the recovery of latent fingerprints from that exhibit, and also allow testimony regarding comparison of the latent prints with known fingerprints of the defendant.

Circuit Rule 36 shall apply on remand. The case shall be reassigned to a district judge who is immediately available to preside, and the trial shall resume as soon as possible.

An explanatory opinion will follow.

Appendix E

United States Court of Appeals,
Seventh Circuit

In Re United States.
Case No. 10-2678.

July 28, 2010

Before POSNER, ROVNER, and SYKES, Circuit Judges.

Rule 25(a)(2) of the criminal rules provides that in cases in which the original trial judge is disabled, the judge who replaces him must certify his familiarity with the trial record before proceeding. Although the rule speaks only of "death, sickness, or other disability," and does not mention other reasons why a judge might cease to preside over a case during trial, it defines a practice that should be followed whatever the reason. Therefore we direct that the new judge before proceeding with the trial certify his familiarity with the trial record.

Appendix F

United States Court of Appeals,
Seventh Circuit

In Re United States.
Case No. 10-2678.

August 20, 2010

Before POSNER, ROVNER, and SYKES, Circuit Judges.

ORDER

On July 27, 2010, petitioner filed a petition for rehearing and petition for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

Appendix G

United States District Court
Northern District of Illinois
Eastern Division

UNITED STATES of America, Plaintiff
v.
Clacy Watson HERRERA, Defendant.
No. 01 CR 1098-1.

July 22, 2010

VOLUME 11
EXCERPT OF TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES F.
HOLDERMAN

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THE COURT: "The government need not exclude all possibilities of tampering with evidence in order to establish a sufficient chain of custody. What the government needs to show is only that it took reasonable precautions to preserve the original condition of the evidence. If the trial judge is satisfied in a reasonable probability that the evidence has not been altered in any material respect, he may permit its introduction."

I have excluded from my consideration possibilities of tampering due to failures on the part of the government agents to properly document the chain of custody in this case. I have given credit to every government witness who has testified about which that witness has testified.

It was clear to me from reviewing Government Exhibit Roberson Seizure Chain of Custody Document, as an experienced trial judge, a former Assistant United States Attorney, a former counsel in private practice, many, many years of litigation experience, that there were some problems with the handling of Government Exhibit Roberson Seizure 2, problems that presented possibilities of tampering.

The government answered some. As I said, I have given credit to every government witness and the testimony they have provided.

The government did not elicit testimony from Lynnette Prado why the weight increased by more than 20 grams with regard to the illegal, allegedly

illegal heroin, and that is a part of Government Exhibit Roberson Seizure 2.

The government had the same document I had. The government could have examined it and maybe did examine it. That was a question that needed to be answered. That was a question the government did not answer, will not answer. And so the document itself evidences a change, a material change in the condition of the exhibit. An increase of the weight, whether it's packaging or drugs -- we don't know. But we know that the weight then continued to remain constant in that same condition after it was altered from 330 grams to 350 grams in September of 2001. We know that from the document, Government Exhibit Roberson Seizure Chain of Custody Document. The government counsel knew that, too.

I have looked at this carefully as a seasoned trial judge would. I have done what I can to give the government every chance -- more chances than the defense thinks I should have given them -- to address this question of material change in the exhibit and the condition of the exhibit. The government did not show me the reasonable precautions that it took with regard to the rebagging. No evidence was presented about that exhibit on that point, Government Exhibit Roberson Seizure 2.

I tried very hard to satisfy myself as the trial judge that there is a reasonable probability that the evidence has not been altered in any material respect, but as I look at the document itself in the absence of any further evidence, I cannot say there is a reasonable probability that the evidence has not

been altered when, in fact, the document shows the evidence has been altered.

The defense objection to Government Exhibit Roberson Seizure 2 is sustained.

Pages 1807-09.

Appendix H

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Appendix I

United States Code Annotated

Title 18. Crimes and Criminal Procedure
Part II. Criminal Procedure
Chapter 235. Appeal
§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or

denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

Appendix J

United States Code Annotated

Federal Rules of Criminal Procedure for the United States District Courts
VI. Trial
Rule 25. Judge's Disability

(a) During Trial. Any judge regularly sitting in or assigned to the court may complete a jury trial if:

(1) the judge before whom the trial began cannot proceed because of absence, death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record.

(b) After a Verdict of Finding of Guilty.

(1) **In General.** After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.

(2) **Granting a New Trial.** The successor judge may grant a new trial if satisfied that:

(A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason.

Supreme Court, U.S.
FILED
FEB 17 2011
OFFICE OF THE CLERK

No. 10-590

In the Supreme Court of the United States

CLACY WATSON HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals violated petitioner's Sixth Amendment rights when, after granting mandamus to correct a ruling "so patently unsound as to exceed the legitimate bounds of judicial power," Pet. App. 5a, it *sua sponte* reassigned the case to a new district judge.

2. Whether the court of appeals' grant of mandamus was such an extraordinary departure from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervisory power.

3. Whether the court of appeals abused the writ of mandamus when it reversed an evidentiary ruling that was a clear and indisputable abuse of discretion, where there was no other adequate remedy for the government.

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In the Supreme Court of the United States

No. 10-590

CLACY WATSON HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is reported at 614 F.3d 661.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2010. A petition for rehearing was denied on August 20, 2010 (Pet. App. 24a). The petition for a writ of certiorari was filed on October 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

During petitioner's jury trial in the United States District Court for the Northern District of Illinois, the court of appeals issued a writ of mandamus directing the district court to admit into evidence a government exhibit, allow the government to recall a witness, and allow

testimony from other government witnesses. The court of appeals also ordered that the case be reassigned to a different district judge. Pet. App. 2a-13a, 22a. Petitioner was subsequently convicted of conspiring to import and export more than five kilograms of cocaine, in violation of 21 U.S.C. 952, 953, and 963; two counts of importing more than 500 grams of cocaine, in violation of 21 U.S.C. 952 and 18 U.S.C. 2; attempting to import cocaine, in violation of 21 U.S.C. 963 and 18 U.S.C. 2; and four counts of importing more than 100 grams of heroin, in violation of 21 U.S.C. 952 and 18 U.S.C. 2. Petitioner has not yet been sentenced.

1. Petitioner, operating in Panama, was the leader and primary supplier of a three-year international drug trafficking conspiracy involving over 40 individuals. From 1996 to 1999, the conspirators imported large amounts of cocaine and heroin into the United States from Jamaica and Panama. The conspirators recruited female couriers in the United States, primarily in Chicago, to travel to Panama to receive drugs from petitioner. The couriers used various methods to smuggle the drugs into the United States, including putting the drugs in plastic wrap packaging which they swallowed or inserted into their body cavities. Pet. App. 15a; 10-2766 Gov't C.A. Mandamus Pet. 3.

2. On December 13, 2001, a grand jury in the Northern District of Illinois charged petitioner and 25 codefendants in a 44-count indictment alleging various drug trafficking offenses. By 2005, the majority of defendants had been convicted. Petitioner remained a fugitive until June 2009, when he was extradited from Panama. Petitioner's trial was scheduled to begin in November 2009. See Pet. App. 15a.

3. In early September 2009, federal agents began culling the evidence obtained in the earlier investigation of the conspiracy for evidence that was connected to petitioner. The government informed petitioner that it was submitting the evidence, including drugs and drug packaging, for fingerprint analysis. On September 21, the deadline for disclosure of expert testimony, the government notified petitioner that it had not yet received any results from the fingerprint testing. On November 2, a week before the trial was scheduled to begin, the government learned that two fingerprints matching petitioner's had been found on a piece of brown tape used to wrap a package of drugs that was recovered from the body cavity of a drug courier. The government disclosed the results to petitioner. On November 3, petitioner moved to exclude the fingerprint evidence on the ground that it was not timely disclosed. The court granted the motion. See Pet. App. 16a; 10-2678 Gov't C.A. Mandamus Pet. 3.

The government took an interlocutory appeal pursuant to 18 U.S.C. 3731, and the court of appeals reversed. The court held that the district court did not abuse its discretion in finding that the government's disclosure was tardy, but that "[t]he punishment simply does not fit the crime." Pet. App. 14a, 17a. The court emphasized that the record did not disclose either "bad faith or reckless foot-dragging by the government" and that the evidence had "immense probative value" given the complexity of the case and the amount of time that had passed while petitioner was a fugitive. *Id.* at 17a-18a. The court therefore concluded that "[e]xclusion of the government's fingerprint evidence was too drastic a remedy," especially because the trial could have been delayed by "a few weeks to give the defense a greater

opportunity to study and confront the evidence." *Id.* at 18a.

4. On July 6, 2010, petitioner's trial began. 10-2678 Gov't C.A. Mandamus Pet. 3. During its case-in-chief, the government sought to introduce "Government Exhibit Roberson Seizure 2" (Roberson Seizure 2), which contained the drugs and their packaging, including the brown tape from which petitioner's fingerprints were recovered. In order to establish the chain of custody for the exhibit, the government presented ten witnesses, who established nearly every link in the chain of custody. 10-2766 Gov't C.A. Mandamus Pet. 8-10. Although one of the forensic chemists who had examined the evidence had since died, the government offered testimony from the chemist's supervisor about the laboratory's routine evidence-handling practices and the chemist's reliability. *Id.* at 9 & n.3. The government's last witness, forensic chemist Stephen Koop, testified about his receipt of the bag containing the evidence and his handling and examination of the bag's contents. He also identified Roberson Seizure 2 as containing the tape that he examined for fingerprints. *Id.* at 10. No evidence indicated that the exhibit had been mishandled in any way.

Following Koop's testimony, the government moved to admit Roberson Seizure 2. Petitioner objected. During the colloquy relating to the evidence's admissibility, the district court raised a succession of theories about possible tampering with the exhibit, speculating that multiple government scientists had manipulated or mishandled the evidence. 10-2678 Gov't C.A. Mandamus Pet. 12-17. The court sustained petitioner's objection to admission of the evidence and also ruled that the government could not recall Koop or present proffered tes-

timony from two forensic scientists who had recovered and verified petitioner's fingerprints. *Id.* at 17-18.

5. The government filed a petition for a writ of mandamus. The district judge requested an opportunity to respond to the mandamus petition, in which he stated that he had "made no definitive ruling on the record admitting or excluding [the] evidence at issue." Pet. App. 20a (brackets in original).

The court of appeals denied the government's petition without prejudice to renewal after the district court had ruled definitively. Pet. App. 20a. In its order, the court of appeals observed that the district court's exclusion of the evidence appeared to be premised on chain-of-custody grounds. Citing Seventh Circuit precedent, the court of appeals emphasized that government officials' actions in maintaining custody of evidence are entitled to a "presumption of regularity"; the government is not required to prove a perfect chain of custody; and any gaps in the chain go to the weight of the evidence, not its admissibility. *Ibid.* (citing *United States* v. *Lee*, 502 F.3d 691, 697 (7th Cir. 2007), cert. denied, 552 U.S. 1219 (2008); *United States* v. *Kelly*, 14 F.3d 1169, 1175 (7th Cir. 1994)).

6. Three days after trial resumed, the district court definitively sustained petitioner's objection to the admission of Roberson Seizure 2 based on what it termed "outrageous conduct," namely, Immigration and Customs Enforcement's routine policy of re-bagging and re-weighing narcotics exhibits each time they are checked in and out of evidence. 10-2766 Gov't C.A. Mandamus Pet. 11; 7/21/10 Tr. 1591-1608. The court speculated that petitioner's fingerprints could have been "introduced" by government officials when the drugs were re-bagged in May or September 2001, a theory that the

district court based on the exhibit's gain of 20 grams in weight during that period. See Pet. App. 9a; 10-2766 Gov't C.A. Mandamus Pet. 11; 7/21/10 Tr. 1592. The government explained that when agents re-bag and re-weigh an exhibit they may include other bags which add to the weight, and it observed that petitioner's fingerprints could not have been obtained and transferred to the adhesive side of the tape while petitioner was in Panama, before his extradition to the United States. The court rejected this explanation, accusing the attorneys for the government of intentionally misleading the court. 10-2766 Gov't C.A. Mandamus Pet. 14; see, *e.g.*, 7/21/10 Tr. 1765 ("I don't believe you when you say just about anything anymore because I know that you will lie to a court any time it helps you. I know that. I saw you do it. I know you will do that."). The court also accused government attorneys of other misconduct, including intentionally seeking a mistrial (even though double jeopardy would have barred a retrial if the government had intentionally procured a mistrial, see *Oregon* v. *Kennedy*, 456 U.S. 667, 673-676 (1982)). 10-2766 Gov't C.A. Mandamus Pet. 13-15; see Pet. App. 4a, 9a-11a.

7. In light of the district court's "definitive" ruling excluding the evidence, the government renewed its petition for a writ of mandamus in the court of appeals. On July 27, 2010, the court of appeals granted the writ, ordering the district court to admit Roberson Seizure 2, allow the government to recall Koop to testify about the recovery of latent fingerprints from that exhibit, and allow the government to present the testimony of forensic scientists about the fingerprint comparison. In addi-

tion, the court ordered, under Seventh Circuit Rule 36,[1] that the case be reassigned to a district judge who was immediately available to preside over the remainder of the trial. The court stated that an explanatory opinion would follow. Pet. App. 22a.

On July 30, 2010, the court of appeals issued an opinion that explained the court's grant of mandamus and also denied petitioner's motion for panel rehearing. Pet. App. 3a. The court stated the district court had excluded Roberson Seizure 2 and the related testimony on "patently unsound" grounds, *id.* at 5a, and that the court of appeals had been forced to grant mandamus in "unavoidable haste," before explaining its reasoning, because the district court had threatened to declare a mistrial, which would have had double-jeopardy effect on the entire case, *id.* at 4a-5a. The court explained that the district court's exclusion of the "especially important" evidence, *id.* at 7a, based on "implausible speculation" that the government had tampered with it, was "so patently unsound as to exceed the legitimate bounds of judicial power," *id.* at 5a, 11a. Recounting the district judge's accusations of government misconduct and his invitation to the jurors to declare themselves unable to continue to serve, *id.* at 4a, the court observed that the district judge had displayed "a degree of anger and hostility toward the government that [was] in excess of any provocation that we can find in the record," *id.* at 9a.

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[1] Seventh Circuit Rule 36 provides that "[w]henever a case tried in a district court is remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case. In appeals which are not subject to this rule by its terms, this court may nevertheless direct in its opinion or order that this rule shall apply on remand."

Given the clarity of the district court's legal error in excluding the evidence and the "manifest" "excess of emotion" displayed by the judge, the court concluded that mandamus was warranted. *Id.* at 11a (citing *United States* v. *Prieto*, 549 F.3d 513, 524-525 (7th Cir. 2008), which held that chain-of-custody issues go to the weight of the evidence).

The court also addressed petitioner's argument that the court had improperly granted the writ of mandamus before petitioner and the district judge had a chance to respond to the government's petition. The court explained that because petitioner had subsequently filed a petition for panel rehearing and rehearing en banc, the court had considered the arguments contained in that petition, as well as in the district judge's request to file a response, before issuing its explanatory opinion. Pet. App. 6a. The court then addressed and rejected petitioner's argument that relief was not warranted because 18 U.S.C. 3731, which governs interlocutory appeals by the government, does not authorize an appeal of an evidentiary ruling after trial has begun. Pet. App. 6a-7a.

Regarding its direction that the case be reassigned, the court explained that Federal Rule of Criminal Procedure 25(a) provides that when "death, sickness, or other disability" prevents the trial judge from continuing to preside over a trial, a new judge may take over the supervision of the trial upon certifying her familiarity with the trial record. Pet. App. 3a. A judge's recusal, the court of appeals stated, falls within Rule 25(a)'s provision for "other disabilit[ies]." *Ibid.* The court of appeals held that the district judge's recusal was warranted under the circumstances, because "[n]o reasonable person would fail to perceive a significant risk that the judge's rulings in the case might be influenced by his

unreasonable fury toward the prosecutors." *Id.* at 12a. The court explained that in light of this reasoning, it had directed in a supplemental order entered on July 28, 2010, that the case be reassigned pursuant to Rule 25(a)(2) and that the new judge certify familiarity with the trial record before proceeding with the trial. *Id.* at 23a.

8. On remand, the new district judge reviewed the trial record and certified her familiarity with it. 8/2/10 Tr. 1902. Trial then resumed, and the new judge admitted Roberson Seizure 2 and permitted the government to offer testimony from Koop and the scientists who identified petitioner's fingerprints on the tape. On August 4, 2010, the jury found petitioner guilty of conspiring to import and export more than five kilograms of cocaine, in violation of 21 U.S.C. 952, 953, and 963; two counts of importing more than 500 grams of cocaine, in violation of 21 U.S.C. 952 and 18 U.S.C. 2; attempting to import cocaine, in violation of 21 U.S.C. 963 and 18 U.S.C. 2; and four counts of importing more than 100 grams of heroin, in violation of 21 U.S.C. 952 and 18 U.S.C. 2. Petitioner was acquitted on several other counts. Petitioner has not yet been sentenced.

ARGUMENT

Petitioner argues (Pet. 15-25) that this Court's review is required because the court of appeals' direction that a new district judge preside over the conclusion of petitioner's trial, without petitioner's consent, violated his Sixth Amendment right to trial by jury. Petitioner also contends (Pet. 21-30) that the court of appeals' grant of mandamus was an extraordinary departure from the ordinary course of judicial proceedings and an abuse of the writ. Further review is not warranted. The

court of appeals' decision is interlocutory, and it does not conflict with any decision of this Court or any other court of appeals. The decision reflects the court's fact-bound evaluation of extraordinary circumstances that are unlikely to arise in any other case, and petitioner's challenges to the court of appeals' conclusions lack merit.

1. Because the court of appeals remanded this case for continuation of petitioner's trial after granting the writ of mandamus, the court of appeals' decision is interlocutory. That posture "alone furnishe[s] sufficient ground for the denial of" the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). Following the district court's final disposition of this case, petitioner will be able to raise his challenges to the substitution of the district judge and the court of appeals' grant of mandamus, together with any other claims that may have arisen out of his conviction and sentencing, in a single petition for certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent * * * judgment[]").

2. Petitioner contends (Pet. 15-25) that "Sixth Amendment due process" prohibits the substitution of a trial judge without the defendant's consent once the trial has begun. Pet. 15-16. Petitioner's argument is without merit, and as petitioner acknowledges, no court has "definitively" considered the question. Pet. 15.

a. As an initial matter, petitioner did not present this argument to the court of appeals in his amended petition for rehearing, and so that court did not address the constitutionality of substituting the trial judge without the defendant's consent in its explanatory opinion denying rehearing. This Court generally does not consider issues raised for the first time on certiorari review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

b. In any event, neither the Fifth Amendment nor the Sixth Amendment provides defendants with a free-standing right to have the identity of the trial judge remain the same through the course of the trial. The Fifth Amendment's Due Process Clause guarantees defendants a "fair trial before an unbiased judge." *Citizens United* v. *Federal Election Comm'n*, 130 S. Ct. 876, 910 (2010) (citing *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975)). It does not guarantee that the identity of that unbiased judge must remain constant throughout trial. The Sixth Amendment guarantees the right to trial by an "impartial jury." Although this Court has described this right as including "the superintendence of a judge having power to instruct [the jury] as to the law and advise them in respect of the facts," *Patton* v. *United States*, 281 U.S. 276, 288 (1930), the Court has never suggested that the Sixth Amendment confers a right to have the *same* judge preside over the entire trial, irrespective of the substitute judge's ability to adequately supervise the trial.

Thus, in the absence of a showing that the mid-trial substitution of a judge caused unfair prejudice to the defendant— for instance, a showing that the new judge was biased or the reassignment resulted in specific reasons to question the fairness of the trial or the impartial-

ity of the jury—the substitution implicates no constitutional concerns. See, *e.g.*, *Simons* v. *United States*, 119 F.2d 539, 545 (9th Cir.) (finding no due process violation when the original judge's "successor thoroughly acquainted himself with the facts of the case and read the evidence" and "was in every respect competent to instruct the jury upon the law of the case"), cert. denied, 314 U.S. 616 (1941); *State* v. *Boyd*, 9 P.3d 1273, 1278 (Kan. App. 2000) (stating that "a criminal defendant is not denied any constitutional right when the original trial judge is replaced by another judge who is thoroughly familiar with the record"); *People* v. *Thompson*, 90 N.Y.2d 615, 621 (1997) ("[W]e find nothing in the requirements of due process that indicates that the midtrial substitution of a Judge rises to the level of a per se constitutional violation.").

c. Consistent with these principles, Federal Rule of Criminal Procedure 25(a) permits a new judge to take over a trial in the event of the original judge's "absence, death, sickness, or other disability." The rule helps ensure that a defendant suffers no prejudice from the midtrial substitution of the judge by requiring "the judge completing the trial" to "certif[y] familiarity with the trial record." Fed. R. Crim. P. 25(a)(2). Certification provides assurance that the substitute judge will be able to rule on evidentiary matters, instruct the jury, and perform any other task necessary to supervise the trial. The rule does not, however, require the defendant's consent before the substitution occurs, recognizing that the substitution of a judge who is familiar with the record does not in itself cause the defendant any unfair prejudice.

Petitioner's argument that the substitution of a trial judge without the defendant's consent is a per se viola-

tion of the Sixth Amendment implies that Rule 25(a) is unconstitutional to the extent that it does not require the defendant's consent. See Pet. 18. That argument is without merit. "Rule 25(a) has never been successfully challenged on constitutional grounds." *People* v. *Thompson*, 601 N.Y.S.2d 418, 422 (Sup. Ct. 1993), aff'd, 645 N.Y.S.2d 884 (App. Div. 1996), aff'd, 90 N.Y.2d 615 (1997); see *United States* v. *LaSorsa*, 480 F.2d 522, 531 (2d Cir.) (rejecting argument that substitution under Rule 25(a) was unconstitutional if the defendants did not consent), cert. denied, 414 U.S. 855 (1973); see also *United States* v. *Ortiz*, 603 F.2d 76, 81 (9th Cir. 1979) (upholding Fed. R. Crim. P. 25(b), which permits substitution of a judge after verdict, and rejecting defendant's argument that he could not constitutionally be sentenced by a judge who did not preside over the trial because the new judge was familiar with the record), cert. denied, 444 U.S. 1020 (1980); *United States ex rel. Fields* v. *Fitzpatrick*, 548 F.2d 105 (3d Cir. 1977) (same); *Connelly* v. *United States*, 249 F.2d 576, 580 (8th Cir. 1957) (same), cert. denied, 356 U.S. 921 (1958).

Petitioner relies heavily (Pet. 17-18) on a treatise's suggestion that "[i]n the absence of consent, it would seem that Rule 25(a) cannot be validly applied." 2 Charles Wright & Peter Henning, *Federal Practice and Procedure* § 392 (4th ed. 2009). *Federal Practice and Procedure*, however, bases this statement on a single Second Circuit decision that was issued in 1915—well before Rule 25 was promulgated—and that held that the defendant had a non-waivable right to a single trial judge through the course of the trial. See *Freeman* v. *United States*, 227 F. 732 (1915). *Freeman* does not help petitioner, however, because it was decided on the basis of the now-repudiated premise that the defendant's

right to trial by jury was not waivable, see *Patton*, 281 U.S. at 299, and the court therefore presumed prejudice, see *Freeman*, 227 F. at 759-760. The decision also predated the creation of a procedure in Rule 25(a) for a trial judge to be substituted and for the new judge to certify familiarity with the record. Indeed, the Second Circuit itself has subsequently declined to follow *Freeman* in light of the intervening developments in the law, and it has specifically rejected the argument that petitioner presses here, namely, that "irrespective of whether the defense was prejudiced, an unconsented-to substitution of one judge for another violates the sixth amendment." *LaSorsa*, 480 F.2d at 531 (observing that "the only authority cited by the defendants" was *Freeman* and stating that the court was "not bound by the holding" of *Freeman*). Because *Freeman* has little continuing force in the Second Circuit, that decision lends scant support to a claim that Rule 25(a) is unconstitutional or that the substitution of the judge in this case violated the Sixth Amendment.[2] Nor does *Freeman* create a circuit conflict warranting this Court's review.

The state-court decisions on which petitioner relies (Pet. 18) also do not support his argument. In two of the decisions, the courts held only that, as a matter of state law, mid-trial substitution was impermissible. See *Bailey* v. *State*, 397 N.E.2d 1024, 1027 (Ind. Ct. App. 3d Dist. 1980) (interpreting Indiana's rules of procedure, which did "not purport to apply where the judge be-

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[2] Other decisions have also recognized that *Freeman* has limited force. See, *e.g.*, *Thompson*, 90 N.Y.2d at 619-620; *Commonwealth* v. *Carter*, 669 N.E.2d 203, 205-206 (Mass. 1996) (stating that *Freeman* and similar decisions were "generally entangled with outdated conceptions of the right to trial by jury" as "formalistically * * * requiring a single tribunal comprised of both judge and jury").

comes unavailable before the verdict," and contrasting federal Rule 25(a)); *State* v. *Davis*, 564 S.W.2d 876 (Mo. 1978) ("We decline at this time to adopt a [state] rule of practice comparable to Fed. R. Crim. P. 25(a)."). The third decision, *People* v. *McPherson*, 26 N.Y.S. 236 (N.Y. Sup. Ct. 3d Dep't 1893), has been abrogated by the New York Court of Appeals' holding in *Thompson* that a mid-trial substitution is not a per se constitutional violation. See 90 N.Y.2d at 619 n.3, 621-622 (citing *McPherson*, 26 N.Y.S. at 237).

d. Petitioner contends (Pet. 19-20) that even if the "mid-trial substitution of [a] judge is not unconstitutional *per se*," this Court should consider whether "the substitution of judge prejudiced the [p]etitioner." Petitioner cannot establish that he suffered any prejudice during the continuation of his trial, and this fact-bound question—which the court of appeals necessarily did not have the opportunity to address—does not merit this Court's consideration.

Petitioner first argues (Pet. 20) that he was prejudiced because there was a "very substantial risk that the jury believed that the government was correct" regarding the admissibility of government exhibit Roberson Seizure 2. But that same risk would have existed if the court of appeals had reversed the district court's exclusion of the evidence without reassigning the case. Moreover, the new district judge explicitly instructed the jury that it was not to "speculate about the causes or reasons for the delays" in the case or hold the delays against either party and that it was to "decide the case based only on the evidence." 8/2/10 Tr. 1913. A jury is presumed to follow its instructions. *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987).

Petitioner also argues (Pet. 20-21) that he was prejudiced because his motions for a judgment of acquittal under Fed. R. Crim. P. 29, and for a new trial under Rule 33, were decided by a judge who had not heard the majority of the evidence in the case.[3] But Rule 25(a) is designed to account for that circumstance, by requiring the substituting judge to certify familiarity with the trial record. Fed. R. Crim. P. 25(a)(2). The substituting judge did that here, stating that she had "read the entire trial transcript * * * from beginning to end," "reviewed the docket, the orders entered by Judge Holderman, the opinions from the Court of Appeals, the orders from the Court of Appeals * * * [and] all the photographic exhibits," and was "fully prepared and completely familiar with the record and therefore ready to proceed with the trial." 8/2/10 Tr. 1902. Petitioner does not identify any example of the new judge's unfamiliarity with the record, let alone one that unconstitutionally prejudiced him. Although petitioner suggests (Pet. 19, 21) that prejudice might result if a substitute judge is required to decide credibility issues, petitioner does not identify any aspect of his motions (or any other ruling issued by the substitute judge) that involved credibility issues or that could not have been adjudicated by a judge who was thoroughly familiar with the trial record. Petitioner is entitled to challenge on appeal the district court's denial of his motions, but he has not identified any prejudice arising from the resolution of the motion by a substitute judge who satisfied the requirements of Rule 25.

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[3] As petitioner notes (Pet. 20), his Rule 33 motion had not yet been decided when petitioner filed his petition for a writ of certiorari. The district court has since denied the motion. See 1:01-cr-1098-1 Docket entry No. 844 (Dec. 9, 2010).

3. Petitioner next contends (Pet. i, 21-25) that, in reassigning the case, the court of appeals departed so far from the accepted and usual course of judicial proceedings that an exercise of this Court's supervisory power is warranted. See Sup. Ct. R. 10(a). Petitioner is incorrect.

Petitioner argues (Pet. 21) that the court of appeals improperly "relied almost entirely on one litigant's characterization of the judge's conduct." The court of appeals, however, stated that before issuing its explanatory opinion and denying panel rehearing, it reviewed petitioner's motion for rehearing, the district judge's request to file a response to the government's mandamus petition, and the trial transcript. Pet. App. 6a; see *id.* at 9a (quoting trial transcript). The court thus considered the trial record as well as submissions by both petitioner and the district judge.

Petitioner also argues (Pet. 22-23) that the court of appeals should have given the district judge an opportunity to reconsider his rulings. But the court of appeals did exactly that when it denied the government's first mandamus petition on the basis of the district court's assertion that it had not "definitively" excluded the fingerprint evidence (even though the district court had sustained petitioner's objection to the evidence). Nor was the court of appeals required, as petitioner contends, *ibid.*, to first allow the district judge to consider whether to recuse himself. Such a course would have further delayed the trial. Moreover, when recusal concerns are presented in the context of an appeal, appellate courts regularly order reassignment to a new judge without first giving the original judge the opportunity to recuse himself. See, *e.g.*, *United States* v. *Hernandez*, 604 F.3d 48, 55-56 (2d Cir. 2010) (ordering that case be

reassigned on remand where a reasonable observer might question the district judge's impartiality).

In short, the court of appeals acted with restraint, and its opinion reflects a careful review of the record. Petitioner may find the court of appeals' reasoning "unsatisfactory," Pet. 22, but petitioner's disagreement with the decision does not render the court's action an extraordinary departure from "the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), that warrants an exercise of this Court's supervisory power. Nor does the court of appeals' fact-bound conclusion, based on its review of the trial record, that the original district judge exhibited "unreasonable fury toward the prosecutors" that would lead a reasonable person to question his objectivity, Pet. App. 12a, merit this Court's review.

4. Finally, petitioner asserts (Pet. 25-30) that the court of appeals' grant of mandamus conflicts with this Court's decision in *Will* v. *United States*, 389 U.S. 90 (1967). Petitioner is incorrect.

In *Will*, the Court held that mandamus "does not run the gauntlet of reversible errors," 389 U.S. at 104 (internal quotation marks and citation omitted), and that the writ may be granted only in "extraordinary" circumstances, *id.* at 107. The Court cautioned that if the writ were routinely granted during the course of criminal proceedings, it might be "employed as a substitute for appeal in derogation" of 18 U.S.C. 3731, which permits the government to take an interlocutory appeal of only certain enumerated district-court rulings. *Will*, 389 U.S. at 97. *Will* did not suggest, however, that a court of appeals may not grant mandamus when it is presented with extraordinary circumstances. Rather, in reversing the court of appeals' grant of mandamus, the

Court emphasized that the record was devoid of findings suggesting that mandamus was justified. See *id.* at 107 ("What might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals, we cannot and do not say."); see also *United States* v. *Wexler*, 31 F.3d 117, 128 n.16 (3d Cir. 1994) (stating that *Will* "does not preclude the use of mandamus to review an interlocutory order that expresses an erroneous, preliminary jury instruction"), cert. denied, 513 U.S. 1190 (1995).

Courts have accordingly recognized that although mandamus is an "extraordinary remedy," the writ may be granted within the sound discretion of the court of appeals. See *Miller* v. *French*, 530 U.S. 327, 339 (2000); 28 U.S.C. 1651 (authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). The writ may be issued, consistent with *Will*, when the district court has committed a clear abuse of discretion and no other remedy would suffice. See *Mallard* v. *United States Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989); see also, *e.g.*, *United States* v. *Vinyard*, 539 F.3d 589, 591 (7th Cir. 2008) (mandamus appropriate where district court *sua sponte* vacated defendant's plea); *United States* v. *Amante*, 418 F.3d 220, 222 (2d Cir. 2005) (granting mandamus where district court *sua sponte* bifurcated trial).

Both conditions were satisfied here. As the court of appeals explained, the district court clearly abused its discretion: it inexplicably rejected overwhelming chain-of-custody evidence; disregarded controlling case law establishing that gaps in the chain of custody go to the weight, not the admissibility, of evidence; posited implausible theories about government tampering with

evidence; repeatedly and baselessly accused the government of lying and other misconduct; and threatened to declare a mistrial which would have had a double-jeopardy effect. Pet. App. 4a, 7a-12a. Although petitioner challenges (Pet. 26-28) the court of appeals' characterization of the district court's rulings, that fact-bound issue does not warrant the Court's review.

The government also had no other adequate remedy, because the district judge had excluded highly probative evidence, and double jeopardy would have barred retrial or an appeal had petitioner been acquitted. See Pet. App. 7a; *Wexler*, 31 F.3d at 128-129. Moreover, because the government demonstrated that this case concerned extraordinary circumstances involving a "patently unsound" ruling that would cause irreparable harm, Pet. App. 5a, the court of appeals correctly concluded that the mandamus petition was not an attempted end-run around Section 3731. See *id.* at 7a (rejecting petitioner's argument that mandamus was inappropriate because Section 3731 did not authorize an interlocutory appeal of a mid-trial evidentiary order).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-590

IN THE

Supreme Court of the United States

CLACY WATSON HERRERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. The Government's Response Illustrates Why This Court Should Confine The Use Of Mandamus Within The Limits Imposed By Congress In Criminal Trials.

The Seventh Circuit's use of the extraordinary writ of mandamus to overrule a federal trial judge's evidence ruling during the trial itself is unprecedented and in clear derogation of the Criminal Appeals Act and this Court's analysis in *Will v. United States*, 389 U.S. 90 (1967). This Court ought to review the government's proposed expanded availability of the writ in criminal cases, and it ought to confine the writ so as not to permit a judicially created exception that swallows the rule in the Criminal Appeals Act whenever the government believes the excluded evidence is "highly probative," and the district court has committed an "abuse of discretion." The government's brief in opposition ("Opp. Br.") to Petitioner's Petition for Writ of Certiorari ("Pet.") underscores why this Court's review is appropriate now on the questions presented in the Petition.

First, the government seeks to minimize the import of the Congressional directive by characterizing it as "permit[ting] the government to take an interlocutory appeal of only certain enumerated district court rulings." Opp. Br. at 18. But Section 3731 is explicit in limiting the government's right of interlocutory appeal from criminal evidence rulings to those "not made after

defendant has been put in jeopardy and before the verdict." 18 U.S.C. § 3731. Mandamus relief in this case operated as a substitute for the appellate relief that Congress specifically withheld, and the government's position provides no discernible limits on when the government may seek, and the appellate court grant, an interlocutory appeal in the clothing of a writ of mandamus.

Second, the government's brief in opposition also made clear that it would like to let stand the Seventh Circuit's avoidance of the Criminal Appeals Act, and its significant expansion of mandamus to attack mid-trial evidence rulings adverse to the government, on the grounds that excluded evidence was "highly probative" and that the government thus had "no adequate remedy," meaning it could not appeal a ruling that might diminish its chances of securing a conviction. Opp. Br. at 20. But this Court recognized in *Will* that when Congress limited the government's interlocutory appeal rights in criminal cases, it meant what it said. This Court called the government's inability to appeal "irrelevant" and added that "Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases *that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions*." *Will*, 389 U.S. at 97 n.5 (emphasis added). This Court should review this matter and answer definitively whether the government and the Seventh Circuit have "grant[ed] the Government a

right of review which Congress has chosen to withhold." *Id.*

Third, the government's brief in opposition puts the unprecedented nature of the proposed expansion of the writ of mandamus into sharp focus. None of the cases cited by the government involved a use of mandamus to reverse a mid-trial criminal evidence ruling. In *United States v. Vinyard*, 539 F.3d 589, 591 (7th Cir. 2008), the district court's order had vacated a guilty plea and sentence. In *United States v. Wexler*, 31 F.3d 117, 118-21 (3d Cir. 1994), the mandamus concerned a pre-trial order regarding a jury instruction. In *United States v. Amante*, 418 F.3d 220, 221-22 (2d Cir. 2005), mandamus was sought to challenge an order bifurcating the trial on the day jury selection was to begin. None of those cases supports the use of mandamus to reverse a mid-trial evidence ruling, and none overrides *Will* or Congress's decision to bar mid-trial appeals in criminal cases.

In addition, the government misconstrues the decisions it cites from this Court in support of the proposed expansion of mandamus; neither of those decisions supports the mandamus relief granted here. *See Miller v. French*, 530 U.S. 327, 339 (2000) (casting doubt on whether mandamus would be available to circumvent a statutory limitation on the equitable powers of federal courts under the Prison Litigation Reform Act); *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 308-10 (1989) (approving mandamus where district

court had compelled attorney to represent a client pro bono in a civil matter).

The Seventh Circuit's action in granting mandamus in this case to reverse the district court's evidentiary ruling in the middle of trial is indeed extraordinary and unprecedented, but for reasons that demonstrate the need for this Court's guidance as to the proper limits of mandamus and the viability of Section 3731.

II. The Government Has Misapprehended The Record In A Manner That Suggests Incorrectly That The Evidence Ruling By The Experienced Trial Judge Here Is Too "Fact-Bound" To Warrant This Court's Review.

In the Seventh Circuit and in this Court, the government has misconstrued the record to suggest that the experienced trial judge in this matter ruled "inexplicably" out of "unreasonable fury" and based on "implausible" theories, and thus that this matter is too "fact-bound" for this Court's review. Opp. Br. at 18-20. Petitioner respectfully disagrees. The district court's ruling turned on the government's inability to introduce admissible evidence, in the form of testimony by a witness with personal knowledge, as to how a bag of narcotics grew by 20 grams in weight by sitting on a shelf in the government's evidence storage room. There is no dispute about the weight variance or the fact that the variance caused the district court to exclude the evidence.

The government offered many explanations but none to the jury and none in the form of a witness who could tell the jury how the exhibit grew in weight. The witness identified by the government could not be produced because, although she had earlier testified at the trial, she had left on a camping trip in a remote area of the Colorado Rocky Mountains. The government's heavy reliance on the district judge's comments about planted evidence is unfortunate because the record plainly shows the district court based its ruling only on the departure of the government's chain-of-custody evidence from the presumption of regularity that ordinarily applies to chain-of-custody evidence but that the court found reason to doubt here. *See* Pet. App. 26a-28a. Similarly, the government and the Seventh Circuit excerpted the district court's harshest comments toward the prosecution, when, in full context, the entire colloquy shows that the district court – who is an experienced federal trial judge, chief judge of the Northern District of Illinois, and a distinguished former federal prosecutor and private practitioner[1] – attempted to assist the government by suggesting means of laying the necessary foundation and justifiably found the government's response frustrating (it had released the necessary witness to

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[1] *See* Paul Marcus, *White Collar Crime: A Legal Overview*, 52 U. Cin. L. Rev. 378, 379 (1983); James F. Holderman, *Essays on the Honorable Paul R. Michel*, 10 J. Marshall Rev. Intell. Prop. L. 277 (Winter 2010-2011).

a remote vacation without soliciting the necessary foundational testimony).

In the end, the government prosecutor admitted on the record that he did not know how the exhibit grew in weight, and the government failed to produce the one witness who it said did have personal knowledge. Consequently, this matter presents important legal issues unaffected by factual details or questions.

III. This Court Should Grant Certiorari Now To Address The Seventh Circuit's Unprecedented and Unwarranted *Sua Sponte* Removal Of The Trial Judge Without Briefing From The Parties And Without The Petitioner's Consent.

As the government concedes, no federal court has "definitively" addressed the extraordinary circumstance of an appeals court's *sua sponte* removal of a criminal defendant's trial judge while the jury was still hearing or set to hear evidence, and without the defendant's consent. Opp. Br. 10. That issue is ripe for resolution now by this Court.

Preliminarily, the government's opposition brief argues that Petitioner failed to raise before the Seventh Circuit his constitutional challenge to the removal and substitution of the trial judge in the middle of trial, *id.* at 11, but that argument highlights the manner in which the Seventh Circuit departed from the accepted and usual course of judicial proceedings. In short, the Seventh Circuit gave the parties virtually no opportunity to file briefs

or make arguments on the question of the judge's removal, which arose *for the first time* when the Seventh Circuit *sua sponte* ordered the judge removed and ordered trial to resume "as soon as possible." Pet. App. at 22a. Neither party had requested such relief. The court entered that order on the docket late on the afternoon of July 27, 2010, prompting the Petitioner to file a rehearing petition, as the Seventh Circuit noted, "seemingly within minutes," Pet. App. at 5a, with a filing shortly before the clerk's office closed, and to supplement the petition with an amended rehearing petition the following morning in an attempt to address the Seventh Circuit's mandamus order as well as the unexpected and unprecedented removal of the trial judge.

In the hastily filed amended rehearing petition, Petitioner called the Seventh Circuit's attention to the "[t]roubling practical and procedural issues" stemming from its *sua sponte* removal of the trial judge and challenged "the entire notion that a new district court could even conduct or resume a trial on such short notice, having no background or experience with the case or the two weeks of trial that went before." Petitioner asked the Seventh Circuit to allow rehearing, whereupon it could give more thorough consideration to those questions, including "the issues of jury competence and effects on the jury." Petitioner thus adequately raised his constitutional challenge. Even if the Court were to conclude that he did not, this Court may review that question under the doctrine of exceptional

circumstances. *See Boumediene v. Bush*, 553 U.S. 723, 772-73 (2008).

The undisputed fact that the government did not request recusal demonstrates the error of the Seventh Circuit's statement that "no reasonable person" would fail to perceive a significant risk that the judge's rulings "might be influenced" by his "unreasonable fury" toward the prosecutors. *See* Pet. App. 12a. The government's inaction suggests that it did not perceive that risk to be sufficient to trigger a recusal motion, despite recent authority in the circuit supporting recusal generally upon a showing of the judge's purported bias. *See In re United States*, 572 F.3d 301, 308 (7th Cir. 2009).

The Seventh Circuit also acted in admitted haste, as demonstrated by its statement that it simply had no time to order a response from the Petitioner. Pet. App. at 6a. The Seventh Circuit then accused the district court of dragging its feet in carrying out the substitution by not designating the replacement judge until the afternoon of July 29 – yet Petitioner's rehearing petition had not even been decided by Seventh Circuit, which released its published opinion on July 30. *See* Pet. App. 2a-3a. In this unusual environment of abbreviated briefing and hasty judicial consideration, which represented a serious departure from the accepted and usual course of judicial proceedings, this Court's review is appropriate now.

The government's claim that certiorari should not be granted now because the Seventh Circuit's

decision is "interlocutory," Opp. Br. 9-10, also ignores the extraordinary nature of the Seventh Circuit's forced recusal order. Modern federal courts have not definitively addressed the due process implications of removing a trial judge while the jury is hearing evidence, perhaps because, as far as Petitioner can tell, no modern federal court has even attempted it until now. The Seventh Circuit at first sought to justify its removal of the trial judge under its own Circuit Rule 36, and then abandoned that justification in its July 30, 2010 opinion. On balance, the highly irregular nature of the Seventh Circuit's action justifies Supreme Court review now, as opposed to after yet another review by the same appeals court which already has decided the matter and denied rehearing. Indeed, the Seventh Circuit's operating procedures appear to call for the assignment of this matter to the same panel which granted mandamus and removed the trial judge. *See* United States Court of Appeals for the Seventh Circuit Operating Procedure 6(b) ("Briefs in a subsequent appeal in a case in which the court has heard an earlier appeal will be sent to the panel that heard the prior appeal"). Meanwhile, the district court has stayed Petitioner's sentencing and entry of judgment on the verdict, pending this Court's decision on the instant certiorari petition.

The government's brief in opposition also served to underscore why this Court should review the Seventh Circuit's removal of the trial judge. The authorities relied on by the government for the constitutionality of the trial judge's removal in the

middle of trial, without Petitioner's consent, are all inapposite. The government cites *Simons v. United States*, 119 F.3d 539, 543 (9th Cir. 1941), where the trial judge had suffered a heart attack before closing arguments – and thus after the jury had heard the evidence. In *State v. Boyd*, 27 Kan. App. 2d 956, 962-63, 9 P.3d 1273, 1279 (Kan. App. 2000), a state appellate court in Kansas approved mid-trial judicial substitution of the initial trial judge, and then the initial trial judge's return in substitution of the second trial judge, based on a state equivalent to Federal Rule of Criminal Procedure 25's requirement that the substitute judge familiarize himself or herself with the record, yet in that case neither substituting judge did so. In *People v. Thompson*, 90 N.Y.2d 615, 620, 687 N.E.2d 1304, 1307 (N.Y. 1997), the New York Court of Appeals considered a judicial substitution to which the defendant explicitly declined to object on federal constitutional grounds, so the case is of little precedential value. As for Federal Rule 25, as Petitioner already noted for the Court, the author of the leading treatise on federal criminal practice has said that it does not authorize mid-trial removal of a trial judge without the defendant's consent. *See* Pet. 17-18.

The government's reliance on *Simons*, *Boyd*, and *Thompson* is notable for another reason bearing upon why this Court should grant review. Each of those cases arose from the trial judge becoming ill during the trial. In the instant case, the trial judge did not become ill, but he was removed *sua sponte* by the court of appeals – after he rejected the

government's offers of evidence before the eyes of a jury which was not finished hearing the evidence and then took more evidence and deliberated to verdict after a substitute judge was installed. The government gives short shrift to this very substantial injection of prejudice and risk of prejudice into the trial by noting that jurors are presumed to follow their instructions. Opp. Br. 15. This Court, however, has exercised its supervisory power when external prejudices threatened to infect jurors even amid standard measures taken to inoculate them. In *Marshall v. United States*, 360 U.S. 310, 312-13 (1959), the Court granted certiorari to consider whether jurors' exposure to newspaper articles prejudiced the trial. Even though all jurors who saw the articles affirmed that they could decide the case fairly and without prejudice from the articles, this Court ordered a new trial. *Id.*

It is impossible to overstate the extent of the prejudice Petitioner suffered by having the jury observe the events that transpired before it. The district court judge ruled against the government in its effort to admit certain evidence. The trial was suspended twice. When the trial finally resumed, the trial judge was replaced and the evidence admitted. These developments focused far too much attention on the evidence, but worse yet, sent the jury a disturbing message concerning the balance of power between the government, which was accusing Petitioner of serious crimes, and the trial judge, who was attempting to ensure the fairness of the proceedings in which he was being tried.

CONCLUSION

This Court should grant Clacy Watson Herrera's Petition for Writ of Certiorari.

Dated: March 1, 2011 Respectfully submitted,

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